77-5324
24

Supreme Court, U. S.
FILED
AUG 24 1977
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-5324

CIVIL ACTION

GONZALEZ, JULIA, Individually and as Guardian Ad Litem For LUIS GONZALEZ, Age 9, and MANUEL GONZALEZ, Age 10, and Further on Behalf of all Persons Similarly Situated,

Petitioners,

v.

YOUNG, JAMES F., Director, Hudson County Welfare Board and G. THOMAS RITTI, Director, New Jersey Division of Public Welfare,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

HUDSON COUNTY LEGAL SERVICES CORP.
TIMOTHY K. MADDEN, DIRECTOR
Theodore A. Gardner, Esq.
Attorneys for Petitioners
628 Newark Avenue,
Jersey City, New Jersey 07306
(201) 792-6363

77-5324

INDEX

	Page
Table of Citations	ii
Citations With Respect to the Instant Case	1.
Jurisdiction of the U.S. Supreme Court With Respect to the Petition	1.
Questions for Review	1.
Statutes and Regulations Involved	1.
Basis of Federal Court Jurisdiction	4.
Statement of the Case	4.
Argument	5.
Conclusion	7.
Index to Appendix	a.

TABLE OF CITATIONS

Page

Federal Statutes Cited

42 U.S.C.A. 1983 . . . . . 1.

28 U.S.C.A. 1343(3) . . . . . 1.

28 U.S.C.A. 1343(4) . . . . . 1.

28 U.S.C.A. 2101(c) . . . . . 1.

U.S.C.A. Const. Art. VI cl. 2 . . . . . 1.

42 U.S.C.A. 606(e)(1) . . . . . 3.

State Regulations Cited

N.J.A.C. 10:82-5.12(c)(1) . . . . . 4.

Rule Cited

Rule 19(b) Title 28-Supreme Court Rules . . . . . 5.

Cases Cited

Blue v. Craig 505 F_2 830 (4 Cir-1974) . . . . . 6.

Gomez v. Florida State Employment Service 417 F_2 569 (5 Cir - 1969) . . . . . 6.

Hagans v. Lavine 415 U.S. 528, 94 S. Ct. 1372(1974) . . . . . 6.

Lynch v. Household Finance Corp. 405 U.S. 538, 92 S. Ct. 1113(1972) . . . . . 6.

Vasquez v. Ferre 404 F. Supp. 815(D.N.J.-1975) . . . . . 6.

Watters v. Parrish 402 F. Supp. 696(W.D. Va.-1975) . . . . . .6.

THE INSTANT CASE

Gonzalez v. Young 418 F. Supp. 566(D.C. N.J. - 1976)

Gonzalez v. Young ____F2____ (3 Cir - July 15. 1977)

JURISDICTION OF THE U.S. SUPREME COURT WITH RESPECT TO THIS PETITION

The final judgment of the Third Circuit is dated July 15, 1977. Jurisdiction is conferred by 28 U.S.C.A. 2101(c)

QUESTIONS FOR REVIEW

a. Is 42 U.S.C.A. 1983 an Act of Congress providing for equal rights of citizens as required by 28 U.S.C.A. 1343(3)

b. Is 42 U.S.C.A. 1983 an Act of Congress providing for the protection of civil right as required by 28 U.S.C.A. 1343 (4)

c. Does the Supremacy Clause satisfy the "secured by the Constitution" requirement of 28 U.S.C.A. 1343(3)

STATUTES AND REGULATIONS INVOLVED

U.S.C.A. Const. Art. VI cl. 2 1968ed. page 715.

This Constitution, and the Law of the United Stated which shall be made in pursuance thereof and all Treaties made, or which shall be made, under the Authority of the United States

shall be the supreme law of the lands; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding

28 U.S.C.A. 1343(3) & (4) 1976 ed. page 310

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote

42 U.S.C.A. 1983, 1974 ed. page 250

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the

deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress

42 U.S.C.A. 606 (e)(1), 1974 ed. page 126

The term "emergency assistance to needy families with children" means any of the following, furnished for a period not in excess of 30 days in any 12 month period, in the case of a needy child under the age of 21 who is (or, within such period as may be specified by the Secretary, has been) living with any of the relatives specified in subsection (a)(1) of this section in a place of residence maintained by one or more of such relatives as his or their own home, but only where such child is without available resources, the payment, care, or services involved are necessary to avoid destitution of such child or to provide living arrangements, in a home for such child, and such destitution or need for living arrangements did not arise because such child or relative refused without good cause to accept employment or training for employment -

(A) money payments, payments in kind, or such other payments as the State agency may specify with respect to, or medical care or any other type of remedial care recognized under State law on behalf of, such child or any other member of the household in which he is living, and

(B) such services as may be specified by the Secretary but only with respect to a State whose State plan approved under sect[illegible] of this title includes provision for such assistance

New Jersey Administrative Code N.J.A.C. 10:82-5.12(c)(1), Volume 10 page 228

Emergency Shelter: When an actual state of homelessness exists or is manifestly imminent, the county welfare board shall authorize payment of the actual cost of adequate emergency shelter arrangements at the most reasonable rate available for a specified temporary period not to exceed the calendar month following the month in which the state of homelessness first becomes known

BASIS OF FEDERAL COURT JURISDICTION

Jurisdiction is in issue. Petitioner asserts jurisdiction under 28 U.S.C.A. 1343 (3) & (4). See also 42 U.S.C.A. 1983

STATEMENT OF THE CASE

On February 2, 1976 petitioner was set upon by a robber who stole all of her welfare funds. Petitioner and her two infants were rendered destitute. They applied to their local welfare office for "emergency assistance" which was denied on the

grounds that petitioner was not homeless. See N.J.A.C. 10:82-5.12(c)(1). Petitioner then filed an action in federal district court alleging that the "homelessness" prerequisite in New Jersey law impermissibly narrowed the term "destitution" as the same is contained in the federal genesis of emergency assistance. [redacted] 606(e)(1). Petitioner's complaint was dismissed by the 3rd Circuit on July 15, 1977 for want of jurisdiction. The 3rd Circuit held:

a. the Supremacy Clause cannot confer jurisdiction under 28 U.S.C.A. 1343(3)

b. 42 U.S.C.A. 1983 is not an Act of Congress providing for equal rights of citizens as required by 28 U.S.C.A. 1343(3)

c. 42 U.S.C.A. 1983 is not an Act of Congress providing for the protection of civil rights as required by 28 U.S.C.A.1343(4)

ARGUMENT

This petitions satisfies the "circuit conflict" and "unsettled important questions" clauses of Rule 19(b), Title 28 Supreme Court Rules. The Third Circuit so noted in the lead sentence of the Gonzalez opinion:

> "This appeal requires us to resolve a question which was left open by the Supreme Court in Hagans v. Lavine 415 U.S. 528(1974) and which has divided the circuits. We are to decide whether the district court had jurisdiction in a claim for damages totalling less than $10,000 and alleging that a state regulation conflicts with a federal statute and therefore must fall because of the Supremacy Clause." Gonzalez v. Young ___F2___(3 Cir, July 15, 1977).

The Third Circuit went on to find an absence of jurisdiction for the reasons noted heretofore. We take issue with this ruling. For the reasons set forth at length in Blue v. Craig 505 F_2 830 (4 Cir - 1974), we respectfully submit that jurisdiction is appropriate in the instant case both because the Supremacy Clause is within the ambit of 28 U.S.C.A. 1343(3) and because 42 U.S.C.A. 1983 is within the intendment of 28 U.S.C.A. 1343(3) & (4). Accord: Gomez v. Florida State Employment Service 417 F_2 569 (5 Cir-1969), Vasquez v. Ferre 404 F. Supp. 815(D.N.J. 1975). Watters v. Parrish 402 F. Supp. 696(W.D.Va.-1975). CF. Lynch v. Household Finance Corp. 405 U.S. 538, 92 S. Ct. 1113(1972), Hagans v. Lavine 415 U.S. 528, 94 S. Ct. 1372 (1974).

CONCLUSION

It is respectfully submitted that a writ of certiorari should issue.

Respectfully submitted,

HUDSON COUNTY LEGAL SERVICES
Timothy K. Madden, Director

By: /s/ Theodore A. Gardner
Theodore A. Gardner, Esq.

Supreme Court, U. S.
FILED
AUG 24 1977
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

Ocotber Term, 1977

No. 77-5324

CIVIL ACTION

GONZALEZ, JULIA, individually and as Guardian Ad Litem for LUIS GONZALEZ, Age 9, and MANUEL GONZALEA, Age 10, and Further on Behalf of all Persons Similarly Situated,

Petitioners,

v.

YOUNG, JAMES F., Director, Hudson County Welfare Board and G. THOMAS RITTI, Director, New Jersey Division of Public Welfare,

Respondents.

APPENDIX

HUDSON COUNTY LEGAL SERVICES CORP.
TIMOTHY K. MADDEN, DIRECTOR
Theodore A. Gardner, Esq.
Attorneys for Petitioners
628 Newark Avenue,
Jersey City, New Jersey 07306
(201) 792-6363

INDEX TO APPENDIX

Gonzalez v. Young 418 F. Supp. 566 (D.C. N.J.-1976)

United States District Court
District of New Jersey,
Civil Action No. 76-455

Julia Gonzalez, etc.,
Plaintiff,
v.

James F. Young, etc., et al.,
Defendants.

Judge Meanor's Opinion, Dated August 13, 1976 . . . . . .

The Opinion has not been reproduced here
but can be found in the Appendix Volume at Page 21.

Gonzalez v. Young 560 F2 160 (3 Cir - July 15, 1977)

United States Court of Appeals
For The Third Circuit
Civil No. 76-2410

Gonzalez, Julia, etc.,
Appellant,
v.

Young, James F., etc., et al.,
Appellee.

Judge Aldisert's Opinion, Filed July 15, 1977 . . . . . .

The Opinion has not been reproduced here but can be found
in the Appendix Volume at Page 35.

Supreme Court, U. S.
FILED
MAY 8 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5324

JULIA GONZALEZ, ETC.,

Petitioner,

—*v.*—

JAMES F. YOUNG, DIRECTOR, HUDSON COUNTY WELFARE BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 24, 1977
CERTIORARI GRANTED FEBRUARY 21, 1978

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5324

JULIA GONZALEZ, ETC.,

Petitioner,

—*v.*—

JAMES F. YOUNG, DIRECTOR, HUDSON COUNTY WELFARE BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX

	Page
Docket Entries	1
Verified Complaint	2
Answer of James F. Young	11
Answer of G. Thomas Riti	12
Affidavit of Nina Fondi	15
Affidavit of G. Thomas Riti	17
Affidavit of Julia Gonzalez	19
Order of Hon. Curtis Meanor, Judge, U.S. Dist. Ct.	20
Opinion of Hon. Curtis Meanor, Judge, U.S. Dist. Ct.	21
Notice of Appeal	32
Attorney's Statement as To Record on Appeal	34
Opinion & Judgment of the 3rd Circuit	35
Order of Hon. Curtis Meanor pursuant to 3rd Circuit Opinion	52
Order of the Supreme Court of the United States granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari	53

DOCKET ENTRIES

Verified Complaint filed March 11, 1976

Answer of James F. Young filed April 2, 1976

Answer of G. Thomas Riti filed April 6, 1976

Affidavit of Nina Fondi filed April 6, 1976

Affidavit of G. Thomas Riti filed May 7, 1976

Affidavit of Julia Gonzalez filed June 8, 1976

Order of Hon. Curtis Meanor filed August 30, 1976

Opinion of Hon. Curtis Meanor filed August 30, 1976

Notice of Appeal filed September 13, 1976

Attorney's Statement As to Record on Appeal October 15, 1976

Opinion and Order of the 3rd Circuit dated July 15, 1977

Order of Hon. Curtis Meanon pursuant to 3rd Circuit. Opinion Order dated August 18, 1977

Order Granting Petition for Certiorari dated February 21, 1978.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 76-455

JULIA GONZALEZ, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR LUIS GONZALEZ, AGE 9, AND MANUEL GONZALEZ, AGE 10, AND FURTHER ON BEHALF OF ALL PERSONS SIMILARLY SITUATED, PLAINTIFFS

vs.

JAMES F. YOUNG, DIRECTOR, HUDSON COUNTY WELFARE BOARD, AND G. THOMAS RITTI, DIRECTOR, NEW JERSEY DIVISION OF PUBLIC WELFARE, DEFENDANT

VERIFIED COMPLAINT—Filed March 11, 1976

PRELIMINARY STATEMENT

This is a 1983 suit wherein a class of welfare recipients in Hudson County complain that the Hudson County Welfare Board refuses to grant emergency assistance payments even though obligated by Federal Statutes and Federal Regulations to do so. The plaintiffs further complain that the New Jersey Division of Public Welfare persistently refuses to promulgate meaningful administrative procedures directed to a good faith implementation of said emergency assistance, federal statutes and regulations.

JURISDICTION

This court has jurisdiction with respect to this matter under and by virtue of the provisions of 42 U.S.C. 1983, 28 U.S.C. 1343, and 28 U.S.C. 1331.

CLASS ACTION

Plaintiffs are properly classed in this action because they satisfy all of the requirements of F.R.C.P. 23.

PLAINTIFFS

The plaintiffs are Luis Gonzalez, an infant of 9 years, Manuel Gonzalez, an infant of 10 years and Julia Gonzalez, their mother. The health, safety and welfare of each of the Gonzalez's is presently endangered because the defendant James F. Young refuses to grant an emergency assistance welfare payment to them. The plaintiff class consists of all welfare recipients in Hudson County whose emergency assistance requests have been, are now, and will continue to be, until the resolution of this controversy summarily denied by James Young.

DEFENDANTS

James F. Young is the director of the Hudson County Welfare Board. In such capacity he is charged with the obligation of dispensing emergency assistance to needy welfare recipients in Hudson County. On February 3, 1976 and again on February 26, 1976 James Young refused to authorize an emergency assistance payment to Julia Gonzalez.

The defendant G. Thomas Ritti is the director of the Division of Public Welfare of the State of New Jersey. In that capacity he is charged with the obligation of providing administrative fair hearings to welfare recipients who are denied emergency assistance. To this date Mr. Ritti has failed to promulgate a meaningful fair hearing appariti with respect to applicants who are denied emergency assistance.

FACTUAL ALLEGATIONS AS TO THE FIRST CAUSE OF ACTION

1. Julia Gonzalez lives in an apartment at 570 Jersey Avenue, Jersey City, New Jersey with her two children, Luis Gonzalez, age 9 and Manuel Gonzalez, age 10.

2. Julia Gonzalez receives a monthly aid to Dependent Children grant from the Hudson County Welfare Board in the sum of $235.00. In addition she receives a monthly child's disability grant from the Social Security Ad-

ministration in the sum of $157.00. (Her 9 year old son Luis is retarded.) These grants are Julia Gonzalez's sole income.

3. On Monday, February 2, 1976 Julia Gonzalez received the grant from the Hudson County Welfare Board and from the Social Security Administration. As was her customs she went to the FINAST FOOD MARKET on Jersey Avenue and cashed both checks. She received the sum of $392.00; placed same in her wallet in her purse and left the store. Immediately upon leaving the store Julia Gonzalez was accosted by an assailant who took her purse containing all the money and fled.

4. Immediately thereafter Julia Gonzalez proceeded to Precint #5 of the Jersey City Police Department and reported the incident. The police have however not been able to recover any money to this date.

5. The next day Tuesday, February 3, 1976 Julia Gonzalez went to the Hudson County Welfare Board and requested of her caseworker, one Nina Fondi, emergency assistance to enable her to pay her February rent ($65.00) and her gas and electric bill ($98.00) (the gas and electric bill which was received by Julia Gonzalez in the last week of January was for December, 1975 and January, 1976; this is because Public Service bills Julia Gonzalez on a two month basis). Nina Fondi told Julia Gonzalez that the Hudson County Welfare Board could not provide any emergency assistance. (Nina Fondi did however give her food stamps.)

6. Thereafter a representative from Public Service advised Julia Gonzalez that her gas and electricity would be shut off. In addition Julia Gonzalez's landlord advised her that she would have to pay her February rent.

7. In this desperate situation Julia Gonzalez was referred to the attorney who represents her in this action. Her attorney immediately forwarded a letter to James F. Young and to the attorney for the Hudson County Welfare Board requesting emergency assistance (see letter of February 25, 1976 which is attached hereto and made a part of hereof). To this date no meaningful response has been forthcoming from the Welfare Board.

8. As a result of the aforesaid Julia Gonzalez is in imminent danger of having her gas and electricity terminated. She is further within the approximation of dispossession since she can't pay her February rent. She fears for the safety and well-being of her sons, one of whom is retarded, and she fears for her own safety and well-being.

9. Before concluding this statement of facts with respect to Julia Gonzalez it must be pointed out that she has been a recipient of Aid to Dependent Children Assistance for several years and she has never previously applied for emergency assistance. Julia Gonzalez has also been a customer of Public Service for several years and she has never previously failed to timely pay her gas and electricity bill.

10. Regarding the plaintiff class it is alleged that James F. Young patently, pervasively and continually refuses to meaningfully authorize emergency assistance payments when members of the plaintiff class request same.

FIRST CAUSE OF ACTION

1. By refusing to authorize emergency assistance in the sum of $163.00 ($63.00 rent, $98.00 gas and electricity) to Julia Gonzalez even though same is desperately needed and even though Julia Gonzalez is clearly entitled to same under Federal Law the defendant James Young has violated and continues to violate 42 U.S.C. A606(e)(1) and 45 C.F.R. 233.120 which provide for and mandate emergency assistance payment to Aid to Dependent Recipients such as Julia Gonzalez who find themselves in necessitous circumstances. James Young's refusal at bar further violates the New Jersey Assistance Standards Manual (ASH) Section 530 which mandates James Young to provide "emergency assistance payments" to Aid To Dependent Children recipients such as Julia Gonzalez.

2. By refusing to meaningfully authorize emergency assistance payments when needed by the plaintiff class James Young has and continues to violate and offend the aforesaid statutes and regulations.

FACTUAL ALLEGATIONS AS TO THE SECOND CAUSE OF ACTION

1. The defendant G. Thomas Ritti, director of the Division of Public Welfare of the State of New Jersey is charged with the obligation of implementing meaningful administrative procedures for welfare recipients who are denied emergency assistance.

2. To this date Mr. Ritti has failed to implement any meaningful procedures respecting emergency assistance payments. As a result individuals such as the plaintiffs are not only being denied benefits which are available to them under Federal Law they are also being denied access to meaningful administrative review respecting their claims for emergency assistance.

3. In a letter dated February 25, 1976 (see letter attached hereto and made a part hereof) the plaintiffs have called this problem to the attention of Mr. Ritti but to this date Mr. Ritti has done nothing to rectify the problem.

SECOND CAUSE OF ACTION

1. By refusing to implement meaningful administrative review procedures anent emergency assistance payments G. Thomas Ritti has and continues to infringe upon, obstruct and effectively deny Aid to Dependent Children recipients emergency assistance payments which are available to them under the aforesaid federal statutes and regulations.

PRAYER FOR RELIEF

WHEREFORE plaintiffs respectfully pray this Court to:

(a) Assume jurisdiction of this cause; certify plaintiff class; and set this case promptly for a hearing.

(b) Enter an interlocutory injunction mandating James F. Young, Director of the Hudson County Welfare Board to provide Julia Gonzalez an emergency assistance payment in the sum of $163.00 so that Julia Gonzalez

may pay her February rent and gas and electric bill and immunize herself and her children from an environment which will be detrimental to their health and safety.

(c) Enter a declaratory judgment declaring that James F. Young has and continues to violate the plaintiff class's right to emergency assistance payment 42 U.S.C. A606 (e) (1) and 45 C.F.R. 233.120. Consistent therewith enter a permanent injunction restraining and enjoining him from refusing emergency assistance payments in the future.

(d) Enter a declaratory judgment declaring that G. Thomas Ritti has and continues to interfere with, obstruct and effectively deny plaintiff's access to emergency assistance payments as provided under federal law by refusing to implement meaningful administrative review procedures anent emergency assistance. Consistent therewith enter a permanent mandatory injunction requiring G. Thomas Ritti to implement meaningful administrative review procedures anent emergency assistance payments and present said procedures to this court within 1 month of this court's decision.

(e) Order such further relief as this court deems just and equitable.

Respectfully submitted,

HUDSON COUNTY LEGAL SERVICES
Timothy K. Madden
Director

BY: /s/ Theodore A. Gardner
THEODORE A. GARDNER
Attorney for Plaintiffs

AFFIDAVIT

STATE OF NEW JERSEY)
) ss:
COUNTY OF HUDSON)

JULIA GONZALEZ, of full age, being duly sworn according to law, upon her oath, deposes and says:

I have read the foregoing complaint and the facts stated therein are true to the best of my knowledge, information and belief and the above complaint is made in truth and good faith for the purposes set forth herein.

/s/ Julia Gonzalez
JULIA GONZALEZ

[Jurat Omitted in Printing]

ATTACHMENT TO VERIFIED COMPLAINT

February 25, 1976

James F. Young, Director
Hudson County Welfare Board
100 Newkirk Street
Jersey City, New Jersey

Attn: William Surdoval, Attorney
for Hudson County Welfare Board

Re: Julia Gonzalez
HC-12547C

Dear Mr. Surdoval:

I am writing to you in your capacity as the attorney for the Hudson County Welfare Board. I represent Julia Gonzalez, HC-12547C, who resides at 570 Jersey Avenue, Jersey City. On February 2, 1976 Julia Gonzalez received a check from the Hudson County Welfare Board in the sum of $235.00. On that same day Julia Gonzalez received a check in the sum of $157.00 from the Social Security Administration for her son Luiz, (age 9) who is disabled. These two checks represent Julia Gonzalez's sole monthly income. Upon receiving the checks Mrs. Gonzalez went to the Finast Food Market on Jersey Avenue where she cashed both checks and received the sum of $392.00. Immediately upon leaving the store Mrs. Gonzalez was accosted by an assailant who took her purse containing all the money and fled. Mrs. Gonzalez immediately went to Jersey City Police, Precinct number 5 and reported the incident. The next day, February 3, 1976, Mrs. Gonzalez went to the Hudson County Welfare Board and requested emergency assistance from her caseworker, Nina Fondi, so that she would be able to pay her rent and her gas and electric bill. Ms. Fondi gave Mrs. Gonzalez some food stamps but indicated that no money could be given to Julia Gonzalez for her rent and for her gas and electric bill. As a result Mrs. Gonzalez was unable to pay her February rent in the sum of $65.00 and her December/January gas and electric bill

in the sum of $98.00 (Public Service) bills Julia Gonzalez every other month). Public Service has advised Julia Gonzalez that her gas and electricity will be terminated if she does not pay the bill. She has also been advised by her landlord that she must pay her February rent. Because she is unable to do so Julia Gonzalez now fears for her safety and welfare and for the safety and welfare of her two children, age 9 and 10.

It is my legal opinion pursuant to 42 U.S.C.A. 606(e)(1), 45 C.F.R. 233.120 and ASH 530 that Julia Gonzalez is entitled to an emergency assistance payment from the Hudson County Welfare Board in the sum of $163.00. Would you kindly advise me with respect to this request and if payment will not be forthcoming would you kindly advise as to whether or not any emergency administrative procedures have been promulgated by the Hudson County Welfare Board to implement the emergency assistance provisions. If you have any questions with respect to any of the above matters kindly telephone me.

Very truly yours,

Theodore A. Gardner

TAG:hh

cert. mail r/r/r/ #512051

CC: Ann Klein, Commissioner of
Dept. of Institutions and Agencies
Attn: G. Thomas Ritti, Director Division
of Public Welfare
cert mail r/r/r/ #512052

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 76-455

[Title Omitted in Printing]

ANSWER OF JAMES F. YOUNG
Filed April 2, 1976

JAMES F. YOUNG, as Director of the Hudson County Welfare Board, by way of answer, says:

1. As to the first cause of action, the defendant admits denial of application for emergency assistance. However, denies the remainder of the allegations contained in the first paragraph.
2. Defendant denies allegations in the second paragraph.

As to the second cause of action this defendant is not named.

SEPARATE DEFENSE

1. Plaintiff is not entitled to emergency assistance within the guidelines set by New Jersey Assistance Standards Handbook, (ASH, Section 530).
2. Defendant James F. Young denies that the Federal District Court has jurisdiction to hear the subject matter of this suit.
3. Defendant denies that there has been a deprivation of any rights to the plaintiff.
4. Plaintiff has failed to exhaust her administrative remedies.

HUDSON COUNTY WELFARE BOARD
JAMES F. YOUNG
Director

/s/ William D. Surdovel
WILLIAM D. SURDOVEL, ESQ.
Attorney for the Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 76-455

[Title Omitted in Printing]

ANSWER OF G. THOMAS RITI
Filed April 6, 1976

The defendant, G. Thomas Riti, Director, New Jersey Division of Public Welfare in answer to the complaint of plaintiff says:

1. He denies the allegations contained in the preliminary statement portion of the complaint.
2. He admits the allegations in the Jurisdiction portion of the complaint that this court has jurisdiction over Civil Rights cases but deny its applicability in the instant case.
3. He denies the allegation contained in the class action portion of the complaint that the instant action is properly a class action.
4. He is without knowledge or information sufficient to form a belief as to the truth of the allegations in the plaintiff's portion of the complaint.
5. He admits the allegation in the first unnumbered paragraph of the defendants' portion of the complaint that James Young is the Director of the Hudson County Welfare Board but denies the remaining allegations in that paragraph.
6. He admits the allegation of the second unnumbered paragraph of the Defendants' portion of the complaint that he is the Director of the New Jersey Division of Public Welfare, but denies the remaining allegations in that paragraph.
7. He is without knowledge or information sufficient to form a belief as to the truth of the allegations in the numbered paragraphs one through ten of the Factual Allegations As to the First Cause of Action portion of the complaint.

8. He is without knowledge or information sufficient to form a belief as to the truth of the allegations in the numbered paragraphs one through two of the First Cause of Action portion of the complaint.
9. He denies the allegations of the numbered paragraphs one through three of the Factual Allegations As to the Second Cause of Action portion of the complaint.
10. He denies the allegations of the numbered paragraph one of the Second Cause of Action portion of the complaint.

FIRST SEPARATE DEFENSE

This court lacks jurisdiction over the subject matter of plaintiff's complaint.

SECOND SEPARATE DEFENSE

The complaint fails to state a claim against defendant upon which relief can be granted.

THIRD SEPARATE DEFENSE

Defendant has violated no fundamental rights of plaintiffs and at all times has acted in accordance with applicable laws and regulations.

FOURTH SEPARATE DEFENSE

This law suit may not properly be maintained as a class action pursuant to Fed. R. Civ. P. 23.

FIFTH SEPARATE DEFENSE

Plaintiffs have failed to exhaust administrative remedies.

SIXTH SEPARATE DEFENSE

This court should abstain from deciding this case since plaintiffs have neglected to avail themselves of the legislatively mandated channels of relief in State courts.

SEVENTH SEPARATE DEFENSE

The complaint is sham and frivolous and states no substantial federal question.

EIGHTH SEPARATE DEFENSE

Plaintiffs have not been deprived of any right, privilege or immunity accrued to him by the United States Constitution or any Act of Congress.

RESERVATION OF RIGHT

The defendant reserves the right, at or before trial of the cause, to move to dismiss the complaint and/or for summary judgment upon the grounds that the complaint fails to state a claim against defendant upon which relief can be granted and defendant is entitled to judgment as a matter of law.

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Defendant,
G. Thomas Ritti, Director,
New Jersey Division of
Public Welfare

By: /s/ Paul N. Watter
PAUL N. WATTER
Deputy Attorney General

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

AFFIDAVIT OF NINA FONDI
Filed April 6, 1976

STATE OF NEW JERSEY)
) ss.
COUNTY OF HUDSON)

NINA FONDI, of full age upon her oath deposes and says:

1.) I am Social Worker employed at the Hudson County Welfare Board.

2.) On the first week of February, Julia Gonzalez came to the Hudson County Welfare Board seeking emergency assistance alleging she had lost the proceeds of the February check.

3.) At that point in conversation, Mrs. Gonzalez informed me that the rent for the month of February was unpaid. She also informed me that there was an outstanding bill from utility, P.S.E. & G. CO., but that bill had not yet been received.

4.) At no time did she tell me that any dispossession or eviction action had been taken, nor was there any indication to me that the gas and electric had been shut off at her apartment.

5.) She reported to the Food Stamp area where an issuance was obtained for her and she was referred to the Food Action Committee of Hudson County.

6.) I explained to her that the lost cash could not be replaced, and since there was not an imminent state of homelessness or imminent threat of the utilities being shut off, it was determined that she was not qualified for emergency assistance under the Provisions of ASH 530.3.

7.) This action on my behalf was reviewed by the Administrative Supervisor, Katherine Bear, whom I un-

derstand thereafter made the final determination that there was not a qualification for emergency assistance.

/s/ Nina Fondi
NINA FONDI
Social Worker

[Jurat Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 76-455

AFFIDAVIT OF G. THOMAS RITI
Filed May 7, 1976

[Title Omitted in Printing]

STATE OF NEW JERSEY)
) ss:
COUNTY OF MERCER)

G. THOMAS RITI, of full age, being duly sworn according to law upon his oath deposes and says:

1. I am the Director of the New Jersey Division of Public Welfare and am a defendant in the lawsuit known as *Gonzalez* v. *Young*.

2. In my capacity as Director, I am responsible for the administration of public assistance programs in New Jersey. I do not, however, possess either the power or authority to promulgate regulations in conjunction with the Aid to Families with Dependent Children (AFDC) program, of which the Emergency Assistance program is a part. Pursuant to N.J.S.A. 44:10-3, the Legislature has delegated such power and authority only to the Commissioner of Institutions and Agencies.

3. New Jersey has participated in the federally funded Emergency Assistance program authorized by Title IV-A of the Social Security Act since March 1969.

4. At all times since that date, New Jersey's Emergency Assistance regulation has been approved by the Department of Health, Education and Welfare.

5. The current New Jersey Emergency Assistance regulation, contained in § 530 of the Assistance Standards Handbook, was approved by Elmer Smith, Regional Commissioner of the Department of Health, Education and Welfare, on August 4, 1975. A copy of the notice of approval is attached to this affidavit.

/s/ G. Thomas Riti
G. THOMAS RITI

[Jurat Omitted in Printing]

SOCIAL AND REHABILITATION SERVICE
Washington, D. C. 20201

AFFIDAVIT: G. THOMAS
DATED: May 7, 1976.

TRANSMITTAL AND NOTICE OF APPROVAL OF STATE PLAN MATERIAL
SOCIAL AND REHABILITATION SERVICE STATE PLAN PROGRAMS

TO: REGIONAL COMMISSIONER
SOCIAL AND REHABILITATION SERVICE
DEPARTMENT OF HEALTH, EDUCATION, & WELFARE

TRANSMITTAL NUMBER: 75-3

I PROGRAM IDENTIFICATION *(Same identification as title page of preprinted plan)*

State Plan for Title IV-A - (Income Maintenance)

II TYPE OF ACTION SUBMITTED FOR APPROVAL *(Check one and enter effective date)*

☒ NEW STATE PLAN
☐ AMENDMENT

EFFECTIVE DATE ⇨ May 1, 1975

COMPLETE REMAINDER OF PART II IF THIS IS AN AMENDMENT *(Separate transmittal for each amendment)*

FEDERAL REGULATION CITATION

45 CFR, Chapter II

NUMBER OF THE PLAN SECTION OR ATTACHMENT	NUMBER OF THE SUPERSEDED PLAN SECTION OR ATTACHMENT
Assistance Standards Handbook	Financial Assistance Manual

SUBJECT OF AMENDMENT

III GOVERNOR'S REVIEW *(Check one)*

☐ GOVERNOR'S OFFICE REPORTED NO COMMENT

☐ COMMENTS OF GOVERNOR'S OFFICE ENCLOSED

☐ NO REPLY RECEIVED WITHIN 45 DAYS OF SUBMITTAL TO GOVERNOR'S OFFICE

/X/ No objection by Governor's Office to formal adoption following advance publication in conformity with New Jersey's Administrative Procedure Act.

SIGNATURE OF STATE AGENCY OFFICIAL

TITLE
Ann Klein, Commissioner
N.J. Department of Institutions & Agencies

DATE
6/2/75

RETURN TO: *(Name and Address of State Agency)*

Division of Public Welfare
120 E. Hanover Street
Trenton, New Jersey 08625

REPORT OF SRS APPROVAL

DATE RECEIVED IN REGIONAL OFFICE: 6/6/75

REGION: II

Plan approved — one copy attached

SIGNATURE OF REGIONAL OFFICIAL

TITLE: REGIONAL COMMISSIONER

DATE: 8/4/75

REMARKS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

AFFIDAVIT OF JULIA GONZALEZ
Filed June 8, 1976

STATE OF NEW JERSEY)
) ss:
COUNTY OF HUDSON)

JULIA GONZALEZ, of full age, being duly sworn according to law upon her oath deposes and says:

1. Since February I have received several letters from Public Service Gas & Electric demanding payment of my utility bill which came due in that month. Since February I have also received many oral inquiries from my landlord about the February rent.

2. I do not like to owe people money and accordingly in April I began taking $20.00 from my monthly income and applying it to the utility bill which became due in February and I also began applying $20.00 to the February rent.

3. As a result of this I have less money to buy food and other items of necessity for myself and my children.

4. I am in desperate need of my full monthly grant. Even this is not enough to buy all of the children's necessities, however, with the $40.00 deduction each month, it is nearly impossible for me to get by.

/s/ Julia Gonzalez
JULIA GONZALEZ

[Jurat Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 76-455

JULIA GONZALEZ, etc., PLAINTIFF

v.

JAMES F. YOUNG, et al., DEFENDANTS

ORDER—Filed August 30, 1976

This cause came on to be heard by the above-entitled court on June 14, 1976 upon the motion of defendants for summary judgment and upon the cross-motion of plaintiff for summary judgment. This court, having carefully considered the same, the affidavits, the pleadings and the briefs in support thereof and in opposition thereto, with Theodore A. Gardner, Esq., appearing as attorney for plaintiff, William D. Surdovel, Esq., appearing as attorney for defendant James Young, and Richard M. Hluchan, Deputy Attorney General, appearing as attorney for defendant G. Thomas Riti, and being fully advised herein, finds that the motion of the plaintiff is not well taken and shall be, and it hereby is, denied.

The court further finds as to the motion of defendants that there is no genuine issue as to any material fact and the defendants are entitled to judgment as a matter of law.

Therefore, it is hereby

ORDERED, that defendants' motion is granted, and judgment is hereby entered for defendants.

Dated:

/s/ H. Curtis Meanor
H. CURTIS MEANOR
U.S.D.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 76-455

JULIA GONZALEZ, etc., PLAINTIFF

v.

JAMES F. YOUNG, etc., et al., DEFENDANTS

OPINION—Filed August 30, 1976

Appearances:

Hudson County Legal Services Corporation
Attorney for Plaintiff
BY: Theodore A. Gardner, Esq.

Hudson County Welfare Board
BY: William D. Surdovel, Esq.
Legal Assistant
Attorney for Defendant, Young

William F. Hyland, Esq.
Attorney General of New Jersey
Attorney for Defendant, Riti
BY: Richard M. Hluchan, Esq.
Deputy Attorney General

MEANOR, District Judge.

The parties have filed cross motions for summary judgment. Following the filing of briefs directed to the issues raised in these motions, as well as to the issue of this court's jurisdiction, arguments were heard and decision was reserved. Due consideration having been given to the arguments advanced by the parties, the court has concluded that the plaintiff's motion for summary judgment will be denied on the grounds that the state regulation in question is not in conflict with the federal statute

and regulation. For the reasons that appear below, judgment will be entered in favor of defendants Young and Riti.

The facts material to decision are not in dispute. The first named plaintiff, Julia Gonzalez, resides in Jersey City, New Jersey with her two children, Luis and Manuel. She and her children are impoverished. Each month Julia Gonzalez receives a check from the Hudson County Welfare Board in the amount of $235. This check is issued pursuant to the Aid to Families with Dependent Children program, hereinafter AFDC. 42 U.S.C. § 601 et seq. AFDC is funded in major part by the federal government and to a lesser extent by state and local authorities. The AFDC check lists Ms. Gonzalez and her son Manuel, age 10, as beneficiaries. Luis Gonzalez, who is retarded, is the recipient of $157 per month from the Social Security Administration's disability program. This check is made payable to Ms. Gonzalez as the protective payee for Luis. Thus, the Gonzalez family receives a total of $392 per month.

On Monday, February 2, 1976, Ms. Gonzalez received the two checks for the month of February. As was her custom, she cashed both of these checks at a supermarket near her home and placed the $392 inside her pocketbook. On her way home from the store, she was accosted, and her pocketbook was stolen. She was then left without the funds needed to pay her rent and utility bills which fell due in the month of February. Ms. Gonzalez reported that theft to the Jersey City police, but there has been no recovery of the stolen cash.

The following day, plaintiff went to the Hudson County Welfare Board to request a grant of emergency assistance in the amount of $163, $65 for rent and $98 for the utility bill. The request was refused by the case worker, Ninda Fondi. Ms. Gonzalez did, however, receive a quantity of food stamps from Miss Fondi. The denial of emergency assistance benefits was based upon a determination by the case worker and her administrative supervisor that Ms. Gonzalez did not qualify under the provisions of § 4810 of the New Jersey Public Assistance

Manual for a grant of emergency assistance. Miss Fondi made phone calls to Ms. Gonzalez's landlord and to the utility company and had received verbal assurances that the utilities would not be turned off and that the landlord would take no steps to evict the Gonzelez family.

Ms. Gonzalez then retained an attorney and made a written request for an emergency grant to the Hudson County Welfare Board on February 25, 1976. The Board thereafter responded and denied the application. Subsequently, plaintiff's attorney wrote to Mr. G. Thomas Riti, the Director of the New Jersey Division of Public Welfare, requesting an accelerated hearing in regard to the County Board's denial. Apparently, this letter was not answered.

Plaintiff commenced this action on March 11, 1976. On the same day, the court signed an order to show cause, making it returnable April 12, 1976. This order directed the defendants to answer within 20 days of service upon them and to be prepared on April 12, 1976 to show cause why the following orders should not issue:

(a) an interlocutory injunction mandating defendant James F. Young to pay Julia Gonzalez the sum of $163 immediately;

(b) an order certifying the proposed plaintiff class, and

(c) an order permitting the named plaintiffs to proceed in forma pauperis.

The order to show cause additionally specified the manner in which the defendants were to be served with process.

The verified complaint is drawn in two counts. The first count alleges that James F. Young's denial of emergency assistance benefits to Ms. Gonzalez unlawfully deprived her of a right secured to her under federal statute and regulation, 42 U.S.C. § 606(e)(1) and 45 C.F.R. § 233.120. It further alleges that Young's denial was also a violation of state law. The second count is directed at Mr. Riti and alleges that his failure to implement any meaningful administrative review procedures in regard to emergency assistance payments has and continues to

"infringe upon, obstruct and effectively deny" AFDC recipients emergency assistance payments which are available to them under federal law.

By way of relief, the complaint seeks a preliminary injunction compelling defendant Young to pay the plaintiff the $163 she seeks in emergency assistance, a declaratory judgment finding that defendant Young has violated and continues to violate plaintiff's rights under federal law and a permanent injunction restraining Young from refusing emergency assistance benefits in the future. Furthermore, the complaint seeks declaratory and injunctive relief against defendant Riti.

Both of the defendants filed timely answers to the complaint and a hearing was held on the return date of the order to show cause. By letter opinion dated April 15, 1976, the court denied the application for preliminary injunctive relief against defendant Young. The court said at that time, "it is clear from the facts before the court that neither Public Service nor the landlord has undertaken steps to discontinue utility service or to evict. Thus, plaintiff is not faced with immediate and irreparable harm." The court also made a preliminary determination that the New Jersey Administrative Code provisions governing the issuance of emergency assistance benefits do not conflict with federal law. The court declined to consider the question of class certification at that time, finding that the matter had not been adequately presented and that there was not sufficient information before the court "upon which to found a decision that a properly defined class exists." Finally, the court raised serious question regarding the jurisdiction of the court to hear the matter and ordered the parties to submit briefs on the matter and to appear for oral argument on June 14, 1976.

On May 12, 1976, defendant Riti, by counsel, moved for summary judgment or in the alternative for an order dismissing the complaint as to him for failure to state a claim upon which relief can be granted. The basis for this motion is the assertion contained in Riti's affidavit that he has no power or authority to promulgate regulations in conjunction with the AFDC program, and, therefore, cannot be ordered to promulgate such regulations.

Plaintiff filed a counter motion for summary judgment on June 10, 1976 which was made returnable on June 14, 1976 so as to be heard at the same time as the other pending matters.

The hearing was held on June 14, 1976, following which the decision of the matter was submitted to the court on undisputed facts. At this hearing, it was brought to the court's attention that the New Jersey Commissioner of Institutions and Agencies had issued a new set of regulations providing for emergency fair hearings to review denials of requests for emergency assistance. Plaintiff's attorney conceded that, should this court require the plaintiff to exhaust her state administrative procedures as a prerequisite to bringing this action in the district court, the newly established state procedures were adequate. Consequently, it would appear that the relief sought under the second count of the complaint has been mooted.

At the conclusion of the hearing, the court indicated that it would await the decision by the Supreme Court in a case then pending which concerned exhaustion requirements in § 1983 suits. *Burrell* v. *McCray*, —— U.S. ——, No. 75-44, decision below reported at 516 F.2d 357 (4th Cir. 1975). By order of June 14, 1976, the Supreme Court dismissed the writ of certiorari as improvidently granted, thereby letting stand the decision of the Court of Appeals for the Fourth Circuit. In these circumstances, it would appear that the plaintiff should not be required to exhaust her state administrative remedies before coming here.

JURISDICTION

The complaint states a claim under 42 U.S.C. § 1983, which provides a cause of action for a deprivation, under color of state law, of any "rights, privileges or immunities secured by the Constitution and laws" of the United States. The plaintiff alleges that the New Jersey regulations implementing the federal emergency assistance program for AFDC recipients conflict with the ap-

plicable federal regulations and, thus, deprive her of the right to receive the federally mandated benefits. Compare, 42 U.S.C. § 606(e)(1) and 45 C.F.R. § 233.120 with New Jersey Administrative Code 10:82-12.11. The plaintiff further alleges that as a result of the narrower eligibility requirements established under the New Jersey regulation, she has been deprived, under color of state law, of rights secured by both the Constitution and laws of the United States. The only constitutional claim the plaintiff presents is that the alleged conflict between the state and federal statutes and regulations violates rights secured for her by the Supremacy Clause of the Constitution. The claim that she has been deprived of rights secured by the laws of the United States is essentially the same: that is, that she has a right under the federal statutes and regulations to receive emergency assistance benefits which are being denied her by state and local officials acting under color of state law.

Plaintiff seeks to posit jurisdiction over these § 1983 claims upon 28 U.S.C. §§ 1331 and 1343. It is unquestionable that the plaintiff has stated a claim arising under the Constitution or laws of the United States and that, if the amount here in controversy exceeded $10,000, exclusive of costs and interest, this court would have jurisdiction under § 1331. However, it is apparent on the face of the complaint that the plaintiff seeks only $163 in damages together with declaratory and injunctive relief. Even as a class action, the amount in controversy requirement cannot be met because the individual claims of the members of this class cannot be aggregated. *Snyder* v. *Harris*, 394 U.S. 332 (1969). Therefore, this court has no jurisdiction to entertain the complaint under § 1331. *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283 (1938).

Plaintiff's claim of jurisdiction under § 1343 is more substantial. There is no doubt that when a complaint states a non-frivolous constitutional claim under § 1983, a district court has the power under 42 U.S.C. § 1343(3) to decide other statutory claims based upon § 1983 even though it has not determined that there is an independent basis for district court jurisdiction over those claims.

Hagans v. *Levine*, 415 U.S. 528 (1974). Indeed, the court in *Hagans*, and in *Townsend* v. *Swank*, 404 U.S. 282 (1971) and *King* v. *Smith*, 392 U.S. 309 (1968) held that the case should be disposed of on the non-constitutional grounds if at all possible. Consequently, the Supreme Court has passed upon questions of federal statutory rights under the Social Security Act without having to decide whether, absent a non-frivolous constitutional claim to which to pend these claims, there is an independent basis for federal jurisdiction under § 1343(3) or (4).

Section 1983 creates a federal cause of action for a deprivation, under color of state law,

> of any rights . . . secured by the Constitution and laws of the United States.

Section 1343 invests the district courts with jurisdiction, without regard to the amount in controversy, of any civil action authorized to be commenced by any person:

> (3) To redress the deprivation, under color of state law . . . of any right . . . secured by the Constitution of the United States or by any Act of Congress *providing for equal rights of citizens*. . . .
>
> (4) . . . under any Act of Congress *providing for the protection of civil rights*, including the right to vote. (Emphases supplied.)

On its face, the language employed by the Congress in both (3) and (4) is narrower than that used in § 1983. The legislative history of the disparity between § 1983 and § 1343(3) does not explain the disparity with certainty; however, some observers have concluded that this disparity was simply accidental. *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, at n.7 (1972); *Note, Federal Judicial Review of State Welfare Practices*, 67 Col. L. Rev. 84 (1967); *Hart and Weschler, The Federal Courts and the Federal System*, p. 961 (2d Ed. 1973).

Plaintiff urges several interpretations of § 1343(3) and (4), any one of which would result in a finding of district court jurisdiction over all non-constitutional claims brought under § 1983 regardless of the amount in controversy. Plaintiff argues that the underscored language

in (3) is superfluous; that § 1983 is itself an Act of Congress "*providing for equal rights of citizens*" within the meaning of (3); that § 1983 is itself an Act of Congress "*providing for the protection of civil rights*" within the meaning of (4); and, finally, that, taken as a whole, § 1343 was meant to confer jurisdiction over all claims arising under § 1983. Plaintiff, of course, also contends that the complaint states a non-frivolous constitutional claim over which it is undisputed that this court must exercise jurisdiction under (3).

All of these assertions are highly arguable, and, were this a matter of first impression in this district, they would require the most careful analysis. However, many of these same questions have recently been resolved by Judge Cohen of this district in a manner which compels me to conclude that this court must exercise jurisdiction over the plaintiff's statutory claims under both (3) and (4). *Vazquez* v. *Perre*, 404 F.Supp. 815 (D.C. N.J. 1975). Thus, the court finds it unnecessary to decide whether the "secured by the Constitution" language of § 1343(3) should be construed to include Supremacy Clause issues and finds it unnecessary to decide independently any of the other issues presented by the parties on this question of jurisdiction.

MERITS OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

New Jersey has elected to participate under that part of the Social Security Act which provides federal matching funds for state grants of emergency assistance to needy families with children. 42 U.S.C. § 606(e)(1); New Jersey Administrative Code 10:82-12.11. Plaintiff contends that the standards of eligibility established by the New Jersey regulations violate federal law in that they are more restrictive than the standards of eligibility mandated by the federal statute and regulations.

43 U.S.C. §606(e)(1) defines "emergency assistance to needy families with children" as the payments of money, among other payments, to a needy child under the age of 21 meeting certain specification, "where such child is

without available resources" which payments "are necessary to avoid destitution of such child or to provide living arrangements in a home for such child." This same section provides that such emergency assistance shall not exceed a period of 30 days in any 12 month period.

The regulations implementing 42 U.S.C. § 606(e)(1) are contained at 45 C.F.R. § 233.120. These regulations establish the minimum standards that proposed state plans, under Title IV, Part A, of the Social Security Act must meet. The proposed state plans must specify eligibility conditions imposed for the receipt of emergency assistance, which conditions may be more liberal than those applicable to other parts of the plan. The proposed state plans must specify whether migrant workers with families are to be included; which emergency needs are to be met; and what services the state proposes to supply. The proposed plan must also provide that emergency assistance shall be given forthwith. 45 C.F.R. § 233.120(a). The regulations also specify the extent of federal financial participation in the grants of emergency assistance. Subject to certain limitations not here relevant, the federal government will contribute to emergency assistance payments made to a qualified child where such "child is without resources immediately accessible to meet his needs," and "the emergency assistance is necessary to avoid destitution of such child or to provide living arrangements for him in a home." 45 C.F.R. § 233.120(b)(ii) and (iii).

New Jersey submitted a proposed plan to the Department of Health, Education and Welfare which met with the Secretary's approval. The provisions of this plan are now embodied in New Jersey Administrative Code 10:82-12.11. These regulations define "emergency assistance" as "any extra or additional payment(s) authorized in accordance with subsections (b) and (c) of this Section during the period of 30 consecutive days immediately following the occurrence of an emergency as defined in subsection (c) of this Section." § 10:83-12.11(a). Subsection (b) contains certain provisions not relevant to this case. Subsection (c) provides, in pertinent part, that emergency assistance payments may be made "when be-

cause of an emergent situation over which they had no control or opportunity to plan in advance, the eligible unit is in a state of homelessness." Subsection (c)(1) further provides that "[w]hen an actual state of homelessness exists or is manifestly imminent, the county welfare board shall authorize payment. . . ."

The plaintiff contends that the New Jersey regulation illegally deprives her of a right, secured by the federal statute, to receive emergency assistance benefits in her present circumstances. While it is established that the standards of eligibility defined under the federal statute and regulations imposed mandatory minimum standards on the states, it is the conclusion of this court that eligibility standards established by the New Jersey regulations are not in conflict with the standards set out in the federal statute or regulations.

Plaintiff relies upon *Mandley* v. *Trainor*, 523 F.2d 415 (7th Cir. 1975); *Williams* v. *Wohlgemuth*, 400 F.Supp. 1309 (E.D. Pa.), affirmed —— F.2d ——, No. 74-3162 (3d Cir. July 20, 1976), and *Purnell* v. *Edelman*, 511 F.2d 1248 (7th Cir. 1974), all of which stand for the proposition that states participating in the federal emergency assistance program must at least meet the standards established under federal law.

In *Mandley*, supra, the court held that a state cannot legally limit the availability of emergency benefits to those persons who are otherwise qualified to receive AFDC benefits. Rather, the court held the class of beneficiaries must be as broad as that defined in 42 U.S.C. § 606(e)(1). In the present case, there is no allegation that New Jersey has restricted the class of persons eligible to receive emergency benefits. The allegation here is that New Jersey has illegally restricted the categories of emergencies for which eligible persons are entitled to receive benefits. *Purnell*, supra, and *Williams*, supra, both involved challenges to the definition of "destitution" contained in state plans. While neither of them is directly on point, *Purnell* does closely approximate the factual context of this case. In *Purnell*, the state of Illinois had defined "destitution" to include being without public utility service. However, the state would not provide

emergency assistance benefits on this basis unless the eligible person was presently without utilities. The court held that the state must also furnish emergency assistance to prevent the discontinuance of the utility services where such termination is shown to be imminent and otherwise unavoidable.

Unlike the Illinois regulations in question in *Purnell*, supra, the New Jersey regulations here in question do provide for the grant of emergency assistance in order to prevent the destitution of an eligible child. As is provided in § 10:82-12.11(c)(1) of the New Jersey Administrative Code, the county welfare board shall authorize the payment of emergency assistance benefits "[w]hen an actual state or homelessness *exists or is manifestly* imminent. . . ." (Emphasis supplied.) Prior to denying the plaintiff emergency assistance, the county board contacted both the plaintiff's landlord and the utility company and ascertained that no action was then planned either to evict or to terminate utilities services. In these circumstances, there was no "manifestly imminent" state of homelessness as defined in subsection 10:82-12.11(c)(1). To deny benefits in these circumstances comports with the decision of the court in *Purnell*, and is in line with the federal statute and regulations which aim to prevent the destitution of eligible children. To require New Jersey to grant assistance where there is only a remote threat of eviction or discontinuation of utility services would be to go beyond the scope and intent of the federal law.

For the foregoing reasons, the plaintiff's motion for summary judgment will be denied. As this denial disposes of all claims against the defendant Young, the complaint shall be dismissed as to him. Inasmuch as the complaint, as it relates to defendant Riti has been rendered moot, see discussion above at page 5, the entire complaint shall be dismissed.

Defendants to submit appropriate orders.

DATED: August 13, 1976.

U.S. COURT OF APPEALS

Docket No.

UNITED STATES DISTRICT COURT

Docket No. 76-455

Civil Action

NOTICE OF APPEAL—Filed September 13, 1976

JULIA GONZALEZ, etc., PLAINTIFF-APPELLANT,

v.

JAMES F. YOUNG, et al., DEFENDANTS-RESPONDENTS.

TO: Chief Clerk,
United States District Court
District of New Jersey

Chief Clerk,
United States Court of Appeals
for the Third Circuit

Richard M. Hluchan,
Deputy Attorney General
Attorney for Respondent Riti

William Surdovel, Esq.
Attorney for Respondent Young.

SIRS and MADAM:

NOTICE is hereby given that Julia Gonzalez, individually and as Guardian Ad Litem for Luis Gonzalez, age 9, and Manuel Gonzalez, age 10, and further on behalf of all persons similarly situated now appeals in the above captioned cause to the United States Court of Appeals for the Third Circuit from an Order of the United States District Court, per the Honorable Curtis Meanor dated September 10, 1976. Said Order entered Summary Judg-

ment in favor of James F. Young, Director of the Hudson County Welfare Board, and G. Thomas Riti, Director, New Jersey Division of Public Welfare, and held that no conflict presently exists between 42 U.S.C. 606 (e) (1) and 45 C.F.R. 233.120 on the one hand and New Jersey Administrative Code: 10:82-12.11, et seq., on the other hand. The only other parties to this action are respondents Young and Riti.

HUDSON COUNTY LEGAL SERVICES
TIMOTHY K. MADDEN, *Director*
Attorneys for Plaintiff-Appellant

By: /s/ Theodore A. Gardner
THEODORE A. GARDNER, ESQ.

U.S. COURT OF APPEALS

Docket No.

UNITED STATES DISTRICT COURT

Docket No. 76-455

Civil Action

ATTORNEY'S STATEMENT REGARDING THE RECORD ON APPEAL (PURSUANT TO RULE 10(b))—Filed Oct. 15, 1976

[Title Omitted in Printing]

To: Richard M. Hluchan,
Deputy Attorney General
Attorney for Respondent Riti

William Surdovel, Esq.
Attorney for Respondent Young

SIRS:

The issue on appeal is: Does a conflict exist between 42 U.S.C. 606(e)(1) and 45 C.F.R. 233.120 on the one hand and N.J.A.C. 10:82-12.11, et seq., on the other hand.

I believe that the following contain all of the requisite facts necessary for a resolution of the issue on appeal:

(a) Opinion of Judge Meanor dated August 13, 1976;

(b) Affidavit of Julia Gonzalez dated June 10, 1976;

(c) Affidavit of G. Thomas Riti dated May 12, 1976;

(d) Affidavit of Nina Fondi dated April 6, 1976;

(e) Verified Complaint of Julia Gonzalez dated March 11, 1976.

If you disagree, kindly advise.

/s/ Theodore A. Gardner
THEODORE A. GARDNER, ESQ.
Attorney for Plaintiff-Appellant

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-2410

GONZALEZ, JULIA, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR LUIS GONZALEZ, AGE 9, AND MANUEL GONZALEZ, AGE 10, AND FURTHER ON BEHALF OF ALL PERSONS SIMILARLY SITUATED, APPELLANT,

v.

YOUNG, JAMES F., DIRECTOR, HUDSON COUNTY WELFARE BOARD AND G. THOMAS RITTI, DIRECTOR, NEW JERSEY DIVISION OF PUBLIC WELFARE

Appeal from the United States District Court
for the District of New Jersey

(D.C. Civil No. 76-455)

Argued June 7, 1977

Before: ALDISERT, ROSENN and HUNTER, *Circuit Judges.*

Hudson County Legal Services
TIMOTHY K. MADDEN, Director
628 Newark Avenue
Jersey City, New Jersey 07306

On the Brief and
Of Counsel:

THEODORE A. GARDNER, ESQ.

COUNSEL FOR APPELLANT

HAROLD J. RUVOLDT, JR., ESQ.
Hudson County Counsel
Administration Building
595 Newark Avenue
Jersey City, New Jersey 07306

On the Brief and
Of Counsel:

WILLIAM D. SURDOVEL
Assistant County Counsel

COUNSEL FOR HUDSON COUNTY WELFARE BOARD DIRECTOR AND HUDSON COUNTY WELFARE BOARD

WILLIAM F. HYLAND
Attorney General of New Jersey
State House Annex
Trenton, New Jersey 08625

Of Counsel:

STEPHEN SKILLMAN
Assistant Attorney General

On the Brief:

RICHARD M. HLUCHAN
Deputy Attorney General

COUNSEL FOR APPELLEE
G. THOMAS RITTI, DIRECTOR,
NEW JERSEY DIVISION OF
PUBLIC WELFARE

OPINION OF THE COURT

(Filed July 15, 1977)

ALDISERT, *Circuit Judge.*

This appeal requires us to resolve a question which was left open by the Supreme Court in *Hagans* v. *Lavine*,

415 U.S. 528 (1974), and which has divided the circuits. We are to decide whether the district court had jurisdiction in a claim for damages totalling less than $10,000 and alleging that a state regulation conflicts with a federal statute and therefore must fall because of the Supremacy Clause.

The question is presented in an appeal by Julia Gonzalez from summary judgment in favor of appellees James F. Young, Director of the Hudson County, New Jersey Welfare Board, and G. Thomas Ritti, Director of the New Jersey Division of Public Welfare. The district court, presented with a challenge to New Jersey welfare regulations which allegedly deprived Gonzalez of benefits ensured by a federal statute, determined that no conflict existed between the challenged state regulations and the applicable provisions of the federal statute and accompanying regulations. Because we determine that the district court did not have jurisdiction over this case in the posture in which it was presented, we vacate the district court's order and remand for dismissal of the complaint for want of jurisdiction.

I.

Appellant resides with her two children in Jersey City, New Jersey. Each month, she receives $235.00 under the Aid to Families with Dependent Children program (AFDC), 42 U.S.C. § 601 *et seq.*, as well as $157.00 under the Social Security Administration's disability program for her one retarded son. On February 2, 1976, Gonzalez received and cashed both checks at a neighborhood food market. Upon leaving the store, she was accosted by a robber who stole the cash. The following day she explained her situation to the Hudson County Welfare Board, requesting $163.00 in emergency assistance funds to cover her rent and utility bills.

States which elect voluntarily to participate in the federal government's AFDC program dispense the federal monies ("matching funds") obtained under the program according to federal eligibility criteria. Minimum standards for emergency assistance eligibility are set out in 42 U.S.C. § 606(e)(1) and its accompanying regula-

tion, 45 C.F.R. § 233.120. The statute provides that emergency assistance to needy families with children embraces cases "where [an eligible] child is without available resources, the payments, care or services involved are necessary to avoid destitution of such child or to provide living arrangements in a home for such child, and such destitution or need for living arrangements did not arise because such child or relative refused without good cause to accept employment or training for employment. . . ." 42 U.S.C. § 606(e)(1).

45 C.F.R. 233.120(a)(1) provides that in order to receive funding, a participating state must specify in a "state plan" the eligibility conditions to be imposed for receipt of emergency assistance. After electing to participate in the AFDC program, New Jersey promulgated the following provision in regard to emergency assistance payments:

> When because of an emergent situation over which they have had no control or opportunity to plan in advance, the eligible unit is in a state of homelessness; and the County Welfare Board determines that the providing of shelter and/or food and/or emergency clothing, and/or minimum essential house furnishings are necessary for health and safety, such needs may be recognized in accordance with the regulations and limitations in the following sections.

N.J.A.C. 10:82-5.12. Pursuant to this state regulation, on March 15, 1976, the Hudson County Welfare Board formally denied Gonzalez' request for emergency assistance, stating that no assistance would be granted because Gonzalez was not in an "imminent or actual state of homelessness."

In her complaint to the district court, Gonzalez alleged that appellee Young violated 42 U.S.C. § 606(e)(1) and 45 C.F.R. 233.120 by refusing to authorize emergency assistance in the amount of $163.00 "even though Julia Gonzalez is clearly entitled to same under Federal Law . . . ." She further alleged that appellee Ritti was responsible for "refusing to promulgate meaningful administrative procedures" for the emergency assistance

program, a claim which was mooted by subsequently promulgated state regulations. Although not articulated, the gravamen of the complaint, and what is pressed on appeal, is that the New Jersey standard violates federal law because it is more restrictive than the standards mandated by federal statutes.

II.

Gonzalez predicated jurisdiction in the district court upon 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331, 1343. Section 1983 provides for a federal cause of action to redress the deprivation, under color of state law, "of any rights, privileges, or immunities secured by the Constitution and laws. . . ." We hold that it is not a jurisdictional statute; it only fashions a remedy. Thus, although Gonzalez may have asserted a claim under section 1983, she had to look to other authority to obtain jurisdiction.

At the onset, 28 U.S.C. § 1311 was properly rejected by the district court because the amount in controversy did not exceed $10,000.00. Gonzalez sought only $163.00 in damages, along with declaratory and injunctive relief. Thus, it appears "to a legal certainty that the claim is really for less than the jurisdictional amount." *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 289 (1938). *See Nelson* v. *Keefer*, 451 F.2d 289 (3d Cir. 1971).

The use of 28 U.S.C. § 1343 as a jurisdictional wellspring for her section 1983 claim, however, is not as clear. Whether it can be used as such is a question of lively and current proportion, on which the circuits are split. The statute provides, in relevant part:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . .
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act

of Congress *providing for equal rights* of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress *providing for the protection of civil rights*, including the right to vote.

28 U.S.C. § 1343(3), (4) (emphasis added).

A.

Any inquiry into the scope of section 1343 must make immediate reference to the Supreme Court case of *Hagans* v. *Lavine*, *supra*. In *Hagans*, the Court decided that when a constitutional claim is made under section 1983 which is of sufficient substance to support federal jurisdiction, a district court has the power under section 1343(3) to consider other claims based on section 1983 without determining that the latter claims, standing alone, are sufficient to support jurisdiction. The current inter-circuit disagreement is largely over whether a claim that a state law conflicts with federal law is of "sufficient substance" to confer jurisdiction, and when, absent a clearly sufficient constitutional claim, there exists an independent basis for jurisdiction under section 1983. Indeed, the questions have been specifically left open by the Supreme Court on a number of occasions. In *King* v. *Smith*, 392 U.S. 309 (1968), the Court stated: "We intimate no views as to whether and under what circumstances suits challenging AFDC provisions only on the ground that they are inconsistent with the federal statute may be brought in federal courts." *Id.* at 312 n.3. And in *Hagans*, *supra*, the Court stated:

> In view of our disposition of this case, we do not reach the question whether, wholly aside from the pendent-jurisdiction rationale relied upon by the District Court, other valid grounds existed for sustaining its jurisdiction to entertain and decide the claim of conflict between federal and state law. It has been suggested, for example, that the conflict question is itself a constitutional matter within the meaning of § 1343(3). *Connecticut Union of Welfare Employees* v. *White*, 55 F. R. D. 481, 486 (Conn. 1972). For purposes of interpreting and applying 28 U.S.C. § 2281, the three-judge-court provision, a claim of conflict between federal and state law has been denominated a claim not requiring a three-judge court. *Swift & Co.* v. *Wickham*, 382 U.S. 111 (1965). But *Swift* itself recognized that a suit to have a state statute declared void and to secure the benefits of the federal statute with which the state law is allegedly in conflict cannot succeed without ultimate resort to the Federal Constitution—"to be sure, any determination that a state statute is void for obstructing a federal statute does rest on the Supremacy Clause of the Federal Constitution." *Id.*, at 125. Moreover, when we have previously determined that state AFDC laws do not conform to the Social Security Act or HEW regulations, they have been invalidated under the Supremacy Clause. See *Townsend* v. *Swank*, 404 U.S. 282, 286 (1971). It is therefore urged that the "secured by the Constitution" language of § 1343(3) should not be construed to exclude Supremacy Clause issues. That question we leave for another day.
>
> Petitioners contend that § 1983 authorizes suits to vindicate rights under the "laws" of the United States as well as under the Constitution and that a suit brought under § 1983 to vindicate a statutory right under the Social Security Act, is a suit under an Act of Congress "providing for the protection of civil rights, including the right to vote" within the meaning of § 1343(4). They further argue that in any event, § 1343(3) in particular, and § 1343 in general, should be construed to invest the district courts with jurisdiction to hear any suit authorized by § 1983. These issues we also do not reach. . . .

415 U.S. at 533-34 n.5. *See also Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 543-44 n.7 (1972); *Rosado*

v. *Wyman*, 397 U.S. 397, 405 n.7 (1970). *See generally District of Columbia* v. *Carter*, 409 U.S. 418 (1973).

B.

Appellant contended in the district court that her complaint raised a nonfrivolous constitutional claim over which the court was obliged to exercise jurisdiction. Our reading of the complaint is that there was no independent constitutional claim sufficient to fall within the jurisdictional language of § 1343(3). We begin by accepting the district court's characterization: "The only constitutional claim the plaintiff presents is that the alleged conflict between the state and federal statutes and regulations violates rights secured for her by the Supremacy Clause of the Constitution." 418 F. Supp. at 569. The district court, however, found it unnecessary to reach this claim, since it had already determined that jurisdiction existed under both section 1343(3) and (4). Under the current state of the law, we suggest that the proper course would have been to determine *initially* whether what was identified as the "constitutional claim" was of "sufficient substance" to confer jurisdiction under section 1343(3), *i.e.*, one to which Gonzalez' statutory claim could then be appended under *Hagans, supra*.[1]

On the question whether a claim that state law conflicts with federal law establishes a sufficient constitutional claim, through the Supremacy Clause, to establish jurisdiction under section 1343(3), we find ourselves in complete agreement with the Second Circuit's resolution of this same problem. In *Andrews* v. *Maher*, 525 F.2d 113 (2d Cir. 1975), that court was presented with a claim that a Connecticut regulation violated various provisions of the Social Security Act, as well as regulations of the

[1] In advocating this method, we are mindful of the Supreme Court's teaching that where pendent jurisdiction obtains, a court should dispose of the case on the nonconstitutional grounds if possible. *E.g.*, *Hagans* v. *Lavine, supra*, 415 U.S. at 543; *California Human Resources Dep't* v. *Java*, 402 U.S. 121, 124 (1971); *Dandridge* v. *Williams*, 397 U.S. 471, 475-76 (1970). We are merely advising that in order to *obtain* jurisdiction, the constitutional claim(s) should be examined first.

Department of Health, Education and Welfare (HEW), which required that AFDC aid be furnished under certain conditions. Addressing the contention that since this claim required ultimate resort to the Supremacy Clause, it was cognizable under section 1343(3) as a deprivation of rights "secured by the Constitution," the court stated:

> We reject the contention because it transforms statutory claims into constitutional claims by verbal legerdemain. The Supremacy Clause does not secure rights to individuals; it states a fundamental structural principle of federalism. While that clause is the reason why a state law that conflicts with a federal statute is invalid, it is the federal statute that confers whatever rights the individual is seeking to vindicate. Moreover, the language of section 1343 (3) clearly contemplates a distinction between rights secured by the Constitution and rights secured by "any Act of Congress." If the latter were just one variety of the former, it would be unnecessary to mention it as a separate situation. The Supreme Court has rejected a similar attempt to construe statutory claims as Supremacy Clause (and therefore constitutional) claims in the context of 28 U.S.C. § 2281, *Swift & Co.* v. *Wickham*, 382 U.S. 111, 125-28, 86 S.Ct. 258, 15 L.Ed.2d 194 (1965), and we see no reason to reach a different result here.

Id. at 118-19 (footnote omitted).

We are cognizant that other courts have held to the contrary. In *Blue* v. *Craig*, 505 F.2d 830 (4th Cir. 1974), the court cited with approval the Supreme Court's statement in *Swift & Co.* v. *Wickham*, 382 U.S. 111, 125 (1965), that "to be sure, any determination that a state statute is void for obstructing a federal statue does rest in the Supremacy Clause." 505 F.2d at 844. With this we agree. However, the *Blue* court concluded that "a claim that a state statute or regulation is inconsistent with federal law poses a constitutional issue under the Supremacy Clause, jurisdictionally cognizable under § 1343(3)" by relying on the *Hagans* footnote quoted

above. We fail to comprehend how the *Hagans* passage, which specifically left the question unresolved, compels a finding that sections 1983 and 1343(3) are coextensive. A statement which specifically does not meet a question cannot be cited as authority for answering it. We conclude that jurisdiction must rest on a constitutional claim of sufficient substance, independent of statutory conflicts under the Supremacy Clause.

C.

Having determined that Gonzalez' complaint presented no constitutional claim sufficient to confer jurisdiction under section 1343(3), we must consider whether the statutory claims had an independent basis for jurisdiction under either section 1343(3) or (4). Jurisdictional sections 1343(3) and (4) of Title 28 are cast in narrower language than that of remedial section 1983 of Title 42. For example, although section 1983 provides for redress of "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws," section 1343(3) covers only those secured by the Constitution *or* an "Act of Congress *providing for equal rights of citizens.*" (Emphasis added.) [2] Appellant nevertheless urged in the district court that the qualifying language of section 1343(3) is superfluous and that, at any rate, section 1983 should be viewed as an act "providing for equal rights." We cannot agree. Gonzalez claims deprivation not of a right secured by the Constitution, but one falling within the Social Security Act, which contains the AFDC provisions. And provisions of the Social Security Act simply were not designed to provide for the equal rights of citizens for purposes of section 1343(3). *Accord*, *Andrews* v. *Maher*, *supra*, 525 F.2d at 118; *Rosado* v. *Wyman*, 414 F.2d 170 (2d Cir. 1969), *rev'd on other grounds*, 397 U.S. 397 (1970); *Randall* v. *Goldmark*, 495

[2] In *Lynch* v. *Household Finance Corp.*, 405 U.S. 538 (1972), in which the Supreme Court made repeated references to section 1983 "and its jurisdictional counterpart, 28 U.S.C. § 1343(3)", *id.* at 540, 543, the Court itself characterized the "equal rights" language as a "limitation". *Id.* at 544 n.7.

F.2d 356 (1st Cir.), *cert. denied*, 419 U.S. 879 (1974); *Dorak* v. *Shapp*, 403 F. Supp. 863, 865 (M.D. Pa. 1975); *Mattingly* v. *Elias*, 325 F. Supp. 1374, 1383 (E.D. Pa. 1971), *rev'd on other grounds*, 482 F.2d 526 (3d Cir. 1973). *But see Blue* v. *Craig*, *supra*; *Vasquez* v. *Ferre*, 404 F. Supp. 815 (D.N.J. 1975); *Watters* v. *Parrish*, 402 F. Supp. 696 (W.D. Va. 1975).[3]

The district court's total reliance on the rationale of *Vasquez* v. *Ferre*, *supra*, to support jurisdiction under section 1343(3), was misplaced. In *Vasquez*, plaintiffs' complaint set forth three causes of action. The section 1983 claim, in the court's own words, was "based upon the deprivation of statutory *as well as* constitutional rights." 404 F. Supp. at 823 (emphasis added). Thus, under the holding of *Hagans*, the *Vasquez* court was free to explore the statutory claims.

To the extent that *Vasquez* sought to bring all section 1983 claims—wholly or partially statutory—under section 1343(3) automatically, we reject it. There is discussion to the effect that the legislative history of section 1343(3) demonstrates that its language was not intended to reduce the jurisdiction of federal district courts over section 1983 actions. This was the tack taken by the Fourth Circuit in *Blue* v. *Craig*, *supra*, perhaps the foremost circuit court case in favor of bringing wholly statutory section 1983 claims under section 1343.

We cannot accept this approach. The term "equal rights" first appeared in that part of the 1875 revision of the Civil Rights Act of 1871 which addressed jurisdiction of the circuit courts. Rev. Stat. § 629(16).[4] The

[3] An early discussion of this, and many of the issues presented by this case, is found in Note, *Federal Jurisdiction Over Challenges to State Welfare Programs*, 72 COL. L. REV. 1404 (1972).

[4] By the Act of June 20, 1874, § 2, Congress charged Secretary of State Hamilton with the duty of preparing for publication and distribution the Revised Statutes of the United States. 18 Stat. 113-14. This work, according to its title page, embraced the statute of the United States, general and permanent in their nature, in force on Dec. 1, 1873, as revised and consolidated by commissioners appointed under an act of Con-

Fourth Circuit contends, and the district court in *Vasquez* agreed, that the term "equal rights" had a broader meaning at that time than it does today. 505 F.2d at 839; 404 F. Supp. at 824. Under this view, the term is merely a " 'short-hand' reference back to all rights of actions qualifying for enforcement under the various remedial statutes enacted to give effect to the mandates of the Fourteenth Amendment." 505 F.2d at 839.

Absent convincing evidence to the contrary, however, we must believe that Congress intended to separate the jurisdictional section from the section fashioning a remedy, which it did, and that "equal rights" does have meaning of its own. We note specifically, as did the Supreme Court in *Lynch* v. *Household Finance Corp., supra*, 405 U.S. at 544 n.7, that when Congress finally abolished the circuit courts' original jurisdiction in 1911 by merging the previously separate jurisdictional grants for the district courts and circuit courts into what is now section 1343(3), it retained the "equal rights" limitation.

Nor do we believe that the Social Security Act is one "providing for the protection of civil rights," as to bring this action under section 1343(4). No claim was made by Gonzalez of infringement of personal liberty, unlawful classification, or discrimination. Again we make reference to the actions of Congress in enacting the jurisdictional grant. Section 1343(4) was intended to ensure jurisdiction over claims based upon the Civil Rights Act of 1957. *See* H.R. Rep. No. 85-291, 1957 U.S. CODE CONG. & ADMIN. NEWS 1966, 1976 (1957). The Social Security Act, which protects the rights Gonzalez asserts here, is of a decidedly dissimilar purpose.

There is an ancillary argument that section 1983 itself provides a jurisdictional basis under section 1343(4) by virtue of its very existence as a statute protecting "rights, privileges and immunities". *See, e.g., Gomez* v. *Florida State Employment Service*, 417 F.2d 569, 580 n.39 (5th

---

gress. Congress "enacted" the Revised Statutes on June 22, 1874; Secretary Fish affixed his seal to the finished work on February 22, 1875.

Brawer v. *Horowitz*, 535 F.2d 830, 838 n. 16 (3d Cir. 1976). *Brawer* provides a discussion of the Act of April 20, 1871.

Cir. 1969). This chicken-and-egg approach must be rejected for several reasons. We have already noted that the language of the two statutes is not the same; one is more restrictive than the other. Second, and more important, it is our view that section 1983 does not in and of itself create or secure any substantive rights; it merely authorizes a cause of action when rights secured by *other* sources have been infringed. In the present case, that "other" source is the Social Security Act. To say in one instant that the Social Security Act is not sufficient in itself to confer jurisdiction under section 1343(4) as an act "providing for the protection of civil rights", and yet to permit the cloaking of that claim within section 1983 *merely in order to confer jurisdiction*, is a route we cannot take. Moreover, as we have heretofore observed, *supra* note 2, the Supreme Court has explicitly rejected the notion that section 1983 is a jurisdictional statute by express reference to 28 U.S.C. § 1343(3) as a "jurisdictional counterpart" of section 1983. *Lynch* v. *Household Finance Corp., supra*, 405 U.S. at 540, 543.

We recognize that the Supreme Court has applied section 1343(4) in causes other than those brought solely under the Civil Rights Act of 1957. *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 412 n.1 (1968) (Civil Rights Act of 1866); *Allen* v. *Board of Education*, 393 U.S. 544, 554 (1969) (Voting Rights Act of 1965). For the reasons expressed by our brethren on the First and Second Circuits, however, we do not go beyond these exceptions. In *Andrews* v. *Maher, supra*, the Second Circuit observed that "there is a difference between extending section 1343(4) to laws such as these, which protect specific rights and engender comparatively little litigation, and applying it to section 1983, which protects all rights 'secured by the Constitution and laws.' " 525 F.2d at 120. And in *Randall* v. *Goldmark*, 495 F.2d 356, 360 (1st Cir.), *cert. denied*, 419 U.S. 879 (1974), the First Circuit expressed similarly compelling reservations:

> Although [*Jones* v. *Mayer*] might be taken as an endorsement of a broad reading of the statute, applying section 1343(4) to section 1983 would in essence

eliminate the jurisdictional amount requirement for any federal question case involving deprivations under color of state law, a consequence arguably so broad when measured in the light of the congressional objectives in adding section 1343(4), that we prefer not to make a positive commitment at this time.

D.

We end our analysis as we began it, by suggesting that the crucial polestar in examining the recent cases in this area is *Hagans, supra.* The presence of a substantial constitutional claim in a cause will afford a litigant the opportunity to press statutory section 1983 claims in the same action. Thus, in *Almenares* v. *Wyman*, 453 F.2d 1075 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972), the Second Circuit could, consistent with its usual position of no jurisdiction over wholly statutory section 1983 claims (*see, e.g., Andrews* v. *Maher, supra; McCall* v. *Shapiro*, 416 F.2d 246 (2d Cir. 1969)), find jurisdiction in a case challenging as violative of HEW regulations state procedures for terminating AFDC benefits where the complaint *also* stated a substantial constitutional claim that the actions of the city violated due process. In *Rosado* v. *Wyman*, 414 F.2d 170 (2d Cir. 1970), *rev'd on other grounds*, 397 U.S. 397 (1970), the same court dismissed a challenge to a state statutory provision which allegedly reduced the amount of AFDC benefits due under the federal statute, since the district judge never had jurisdiction over a constitutional claim to which the statutory claim could have been pendent.

Indeed, the rule of *Hagans* harmonizes our determination in the present case with the decision reached in *Williams* v. *Wohlgemuth*, 540 F.2d 163 (3d Cir. 1976). In *Williams*, former Pennsylvania provisions of the same emergency assistance program at issue here were challenged. At that time, the program limited assistance to emergency needs caused by either civil disorder or national disaster. Unlike the complaint filed for Gonzalez, which contained only the vaguest constitutional overtones relating to the Supremacy Clause, the complaint filed in

Williams alleged that the former Pennsylvania provisions violated the equal protection and due process clauses of the Constitution. Determining that the constitutional claims were neither "wholly insubstantial" nor "wholly frivolous" under *Hagans, supra,* the court decided that the district court had properly taken jurisdiction over the case.

III.

We are not unmindful of the merits of the argument that a federal forum is best suited for adjudicating a claim that federal monies are not being allocated according to a mandatory federal scheme. We have no choice, however, but to act within our jurisdictional limits. It may well be that a federal forum has the necessary sensitivities to handle these claims, but it is for Congress to so determine.

It has been noted that subsequent to enactment of the 1875 Judiciary Act, "the history of federal question jurisdiction . . . [has revolved] largely around the creation by Congress of myriad new federal rights and its provision for their enforcement in the national courts without regard to jurisdictional amount." HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 729 (1953), quoted in *McCall* v. *Shapiro*, 416 F.2d 246, 249, 2d Cir. 1969). In 1969, the prestigious American Law Institute Study issued its Study of the Division of Jurisdiction Between State and Federal Courts. The Study recommended amending § 1331(a) to read: "Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction without regard to amount in controversy of all civil actions. . . ." In introducing S. 1876, the Federal Court Jurisdiction Act of 1973, which specifically incorporated this ALI recommendation, Senator Quentin Burdick stated:

> The most important change here is that Federal question cases may be brought without any requirement that the amount in controversy exceed a fixed dollar amount. The need for a Federal forum is no less in small cases than in large cases. This will clarify many troublesome problems that the district

courts have faced in attempting to determine the value of a case, particularly when equitable relief is requested. Furthermore, it is important that in a case where parties seek to assert Federal rights, they have full access to the district courts.

CONGRESSIONAL RECORD, Vol. 119 at 16679 (May 23, 1973).

Simply put, Congress has not provided for enforcement of the AFDC program without regard to jurisdictional amount. Claims such as that pressed by Gonzalez here may continue to be adjudicated in federal court when they are pendent to a sufficient constitutional claim in the same action, but until Congress acts we are not in a position to adjudicate claims over which we could not exercise independent jurisdiction.

For the foregoing reasons, the judgment of the district court will be vacated and the cause remanded with a direction to dismiss for want of jurisdiction.

TO THE CLERK:

Please file the foregoing opinion.

_____

Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-2410

GONZALEZ, JULIA, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR LUIS GONZALEZ, AGE 9, AND MANUEL GONZALEZ, AGE 10, AND FURTHER ON BEHALF OF ALL PERSONS SIMILARLY SITUATED, APPELLANT,

vs.

YOUNG, JAMES F., DIRECTOR, HUDSON COUNTY WELFARE BOARD AND G. THOMAS RITTI, DIRECTOR, NEW JERSEY DIVISION OF PUBLIC WELFARE

(D.C. Civil Action No. 76-455)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: ALDISERT, ROSENN and HUNTER, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on June 7, 1977.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed September 3, 1976, be, and the same is hereby vacated and the cause remanded with the direction to dismiss the complaint for want of jurisdiction.

ATTEST:

/s/ Thomas F. Quinn
Clerk

July 15, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action

Docket No. 76-455

ORDER—Aug. 18, 1977

GONZALEZ, JULIA, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR LUIS GONZALEZ, AGE 9, AND MANUEL GONZALEZ, AGE 10, AND FURTHER ON BEHALF OF ALL PERSONS SIMILARLY SITUATED, APPELLANT,

vs.

YOUNG, JAMES F., DIRECTOR, HUDSON COUNTY WELFARE BOARD AND G. THOMAS RITTI, DIRECTOR, NEW JERSEY DIVISION OF PUBLIC WELFARE, RESPONDENTS.

For the reasons set forth in the Opinion of the United States Court of Appeals for the Third Circuit No. 76-2410 dated July 15, 1977,

It is on this 18 day of Aug. , 1977,

ORDERED that the Complaint of Julia Gonzalez, etc., et als. be and the same is hereby dismissed for want of jurisdiction.

/s/ H. Curtis Meanor
U.S.D.C.

SUPREME COURT OF THE UNITED STATES

No. 77-5324

JULIA GONZALEZ, ETC., PETITIONER,

v.

JAMES F. YOUNG, DIRECTOR, HUDSON COUNTY WELFARE BOARD, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO the United States Court of Appeals for the Third Circuit.

ON CONSIDERATION of the motion for leave to proceed here *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis be*, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is set for oral argument in tandem with No. 77-719.

February 21, 1978

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 264195 2

ORIGINAL COPY

RECEIVED
DEC - 1 1977
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-5324

JULIA GONZALEZ, Individually and as Guardian Ad Litem for LUIS GONZALEZ, Age 9, and MANUEL GONZALEZ, Age 10, and Further on Behalf of all Persons Similarly Situated,

Petitioners,

v.

JAMES F. YOUNG, Director, Hudson County Welfare Board and G. THOMAS RITI, Director New Jersey Division of Public Welfare,

Respondents.

~~BRIEF~~ IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

WILLIAM F. HYLAND
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Respondent,
G. Thomas Riti, Director,
New Jersey Division of Public Welfare
State House Annex
Trenton, New Jersey 08625

STEPHEN SKILLMAN
Assistant Attorney General
Of Counsel

RICHARD M. HLUCHAN
Deputy Attorney General
On the Brief

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
ARGUMENT--The Petition for a Writ of Certiorari should be denied because the opinion below, which limits jurisdiction only in the narrowest of circumstances, is of insufficient import to merit review by the Court	2
CONCLUSION	4

CASES CITED

Califano v. Mandley, No. 76-1416 (cert. granted June 6, 1977)	3
Gonzalez v. Young, 560 F.2d 160 (3rd Circuit 1977)	2, 3
Hagans v. Lavine, 415 US 528 (1974)	2, 3
King v. Smith, 392 US 309 (1968)	3
Quern v. Mandley, No. 76-1159 (cert. granted June 6, 1977)	3
Rosado v. Wyman, 397 US 397 (1970)	3
Williams v. Wohlgemuth, 540 F.2d 163 (3rd Circuit 1976)	2

STATUTES CITED

Social Security Act	1, 3
Sec. 406(e)	1, 3
42 U.S.C.:	
Sec. 606(e)	1, 3

STATEMENT OF THE CASE

The facts of this matter are essentially undisputed, and are clearly set forth in the reported decisions of both the court of appeals [560 F.2d 160 (3d Cir. 1977)] and the district court [418 F. Supp. 566 (D N.J. 1976)]. Petitioner, Julia Gonzalez, a recipient of Aid to Families with Dependent Children, applied for, and was denied, an emergency assistance grant of $163 to replace funds which had been stolen. The application was denied in accordance with New Jersey's duly promulgated emergency assistance regulations.

Consequently, petitioner filed a civil action in the United States District Court for the District of New Jersey, alleging that she had been denied assistance "even though . . . clearly entitled to same under federal law." The gravamen of her complaint was that New Jersey's emergency program violates federal law because its standard of eligibility is more restrictive than the standard purportedly mandated by § 406(e) of the Social Security Act, 42 USC § 606(e).

Upon consideration of cross motions for summary judgment, the district court entered judgment for defendants on the basis that the State program did not conflict with federal standards.

On appeal, the Court of Appeals for the Third Circuit did not reach the merits of petitioner's claims, but found instead that the district court lacked subject matter jurisdiction over the case "in the posture in which it was presented." 560 F.2d at 163. Hence, the order of the district court was vacated and the matter remanded for dismissal of the complaint for lack of jurisdiction.

Ms. Gonzalez' petition for certiorari seeks review of the Third Circuit's determination regarding jurisdiction.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE OPINION BELOW, WHICH LIMITS JURISDICTION ONLY IN THE NARROWEST OF CIRCUMSTANCES, IS OF INSUFFICIENT IMPORT TO MERIT REVIEW BY THE COURT.

Although facially the decision of the Court of Appeals for the Third Circuit may be an attractive candidate for review by this Court because it concerns the jurisdiction of the district courts to hear civil rights cases, close scrutiny of the decision reveals it to be narrowly drawn and of limited applicability. At the very onset of the opinion, for example, the appellate court made clear that its decision was required because of the manner in which jurisdiction was pleaded: " . . . we determine that the district court did not have jurisdiction over this case in the posture in which it was presented." Gonzalez v. Young, 560 F.2d 160, 163 (3d Cir. 1977) (emphasis added). Terming the decision in Hagans v. Lavine, 415 US 528 (1974) the "crucial polestar" in its analysis, the court unmistakably implied that a more specifically pleaded complaint would easily have alleviated petitioner's jurisdictional difficulty, since the threshold requisite of demonstrating the existence of a substantial constitutional claim is most easily satisfied in welfare matters. See Hagans v. Lavine, 415 US at 564 (Rehnquist, J., dissenting).

Indeed, the court pointed to its recent decision in Williams v. Wohlgemuth, 540 F.2d 163 (3d Cir. 1976), a Pennsylvania case presenting a similar challenge to that state's emergency assistance program, as a model which should have guided the instant petitioner. In Williams, the clearly pleaded constitutional claim met the minimum threshold of substantiality. Because, however, the "complaint filed for Gonzalez . . . contained only the vaguest constitutional overtones relating to the Supremecy Clause," 560 F.2d

at 169, the court properly found that the substantiality test remained unsatisfied in this case.*

It is submitted that only rarely, if at all, will plaintiffs be unable to satisfy the liberally construed substantiality requirements set forth in Hagans, and that, therefore, the issues presented by the instant petition are of interest to only a few litigants. Perhaps it was for this reason that the Court has consistently declined to address these issues when the opportunity to do so has arisen in the past. E.g., Hagans v. Lavine, 415 US at 528 n. 5; Rosado v. Wyman, 397 US 397, 405 n. 7 (1970); King v. Smith, 392 US 309, 312 n. 3 (1968). Because of the limited impact which the Gonzalez decision will have on future litigants, review by this Court of the instant matter is not clearly warranted.

---

* Petitioner cites § 406(e) of the Social Security Act, 42 USC § 606(e) as the only source of the rights asserted by her in this matter. Whether or not that statute secures substantive rights to welfare recipients or merely sets guidelines as to the manner in which states may disburse federal public assistance funds is precisely the issue currently before this Court in Quern v. Mandley, No. 76-1159 (cert. granted June 6, 1977) and Califano v. Mandley, No. 76-1416 (cert. granted June 6, 1977). Should the Court ultimately decide that § 406(e) only limits the circumstances in which federal emergency assistance funds may be expended by the State, petitioner would be unable to claim that the statute secures any rights to her and her claim would thus be rendered non-justiciable.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

WILLIAM F. HYLAND
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Respondent,
G. Thomas Riti, Director,
New Jersey Division of Public Welfare

By _____
Richard M. Hluchan
Deputy Attorney General

STEPHEN SKILLMAN
Assistant Attorney General
Of Counsel

RICHARD M. HLUCHAN
Deputy Attorney General
On the Brief

Supreme Court, U. S.
FILED
APR 18 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5324

JULIA GONZALEZ, *etc.*,

Petitioner,

v.

JAMES F. YOUNG, DIRECTOR, HUDSON COUNTY WELFARE BOARD, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF PETITIONER

THEODORE A. GARDNER, and
WILLIAM E. McALVANAH,
HUDSON COUNTY LEGAL SERVICES CORP.
Timothy K. Madden, Director
628 Newark Avenue
Jersey City, New Jersey 07306

Attorneys for Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

Page

TABLE OF CITATIONS ii

CITATIONS WITH RESPECT TO THE INSTANT CASE 1

JURISDICTION OF THIS COURT 2

STATUTES AND REGULATIONS INVOLVED 2

QUESTIONS PRESENTED 4

BASIS OF FEDERAL COURT JURISDICTION 4

STATEMENT OF THE CASE 5

ARGUMENTS:

POINT I - 42 U.S.C. 1983 AND 28 U.S.C. 1343(3) ARE COEXTENSIVE 6

POINT II - 42 U.S.C. 1983 AND 28 U.S.C. 1343(4) ARE COEXTENSIVE 14

POINT III - SINCE 1343(3), 1343(4) AND 1983 ARE COEXTENSIVE JURISDICTION IS ESTABLISHED IN THE INSTANT CASE EVEN ACCEPTING ARGUENDO THE PREMISE THAT THE SOCIAL SECURITY ACT IS NOT AN ACT OF CONGRESS PROVIDING FOR EQUAL RIGHTS OR FOR THE PROTECTION OF CIVIL RIGHTS 17

POINT IV - THE SUPREMACY CLAUSE SATISFIES THE "SECURED BY THE CONSTITUTION" REQUIREMENT OF 28 U.S.C. 1343(3) THUS PROVIDING AN ALTERNATIVE BASIS FOR JURISDICTION 20

CONCLUSION 30

TABLE OF CITATIONS

Page

STATUTES CITED

28 U.S.C. 1254(1) 2
28 U.S.C. 1343(3) ..... *passim*
28 U.S.C. 1343(4) ..... *passim*
42 U.S.C. 1983 ..... *passim*
U.S.C. Const. Art. VI Cl. 2 3,4,21
42 U.S.C. 606(e) (1) 3,5,21

STATE REGULATION CITED

N.J.A.C. 10:82-5.12(c) (1) 4,5,21

CASES CITED

Aguayo v. Richardson, 473 F_2 1090 (2 Cir.) *cert. den.* 414 U.S. 1146 (1974) 18
Almenares v. Wyman, 453 F_2 1075 (2 Cir. 1971) *cert. den.* 405 U.S. 544 (1972) 16,17
Anderson v. Gladden, 188 F. Supp. 666 (D.C. Or. - 1960) 10
Andrews v. Maher, 525 F_2 113 (2 Cir., 1975) .18,25,26,27,29
Baker v. Carr, 396 U.S. 186 (1962) 27
Blue v. Craig, 505 F_2 830 (4 Cir. - 1974) ...8,11,16,18,25,29
Bomar v. Keyes, 162 F_2 136 (2 Cir.) *cert. den.* 332 U.S. 825 (1947) 8,19
Burd v. McCullough, 217 F_2 93 (3 Cir. - 1958) 7
Carleson v. Remillard, 406 U.S. 598 (1972) 22,24,26
Connecticut Union of Welfare Employees v. White, 55 F.R.D. 481 (D. Conn. - 1972) 25
Dandridge v. Williams, 397 U.S. 471 (1970) 22
Day v. North Am. Rayon Corp., 140 F. Supp. 490 (D.C. Tenn. - 1956) 10

Page

Eison v. Eastman, 421 F_2 960 (2 Cir. - 1969) *cert. denied*, 400 U.S. 841 (1970) 24
Ex. Bd. of Eng. Arc. & Sur. v. Flores De Otero, ____ U.S. ____, 96 S. Ct. 2264 (1976). 9,13
Ex. Parte Poresky, 290 U.S. 30 (1933) 28
Gibbons v. Ogden, 9 Wheat 1, 6 L. Ed. 23 (1824) 22
Goldberg v. Kelly, 397 U.S. 254 (1970) 22
Gomez v. Florida State Employment Service, 417 F_2 569 (5 Cir. - 1969) 8,16,18
Goosby v. Ossner, 409 U.S. 512 (1973) 27,28,29
Gonzalez v. Young, 418 F. Supp. 586 (D.N.J. - 1976) 1
Gonzalez v. Young, 560 F_2 160 (3 Cir. - 1977) 1
Gorin v. U.S., 111 F_2 712 (9 Cir. - 1940) 7
Hagans v. Lavine, 415 U.S. 533 (1973) 23,24,26,27,28
Hague v. CIO, 307 U.S. 496 (1939) 24
Hannis Distilling Co. v. Baltimore, 216 U.S. 285 (1910) 28
Helvering v. Davis, 301 U.S. 619 (1937) 20
Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).12,14,15, 16,24
Jones v. Ingling, 191 F. Supp. 559 (D.C. Guam, 1961) 10
King v. Smith, 392 U.S. 309 (1968) 23
Lassen v. Arizona, ex rel. Arizona Highway Dept. 385 U.S. 458 (1969) 20
Lynch v. Household Finance Corp., 405 U.S. 538 (1972) ..... *passim*
McCall v. Shapiro, 416 F_2 246 (2 Cir. - 1969) .. 13,14,16,17
Monroe v. Pape, 365 U.S. 167 (1961) 19
Moore v. County of Alameda, 411 U.S. 693 (1973) 16
Peacock v. City of Greenwood, 384 U.S. 808 (1964) 19

Page

People of State of New York v. Galamision, 342 F2 255 (2 Cir. - 1965) *Cert. den.* 85 S. Ct. 1342 (1966).13,14

Randall v. Goldmark, 495 F2 356 (1 Cir. - 1974)..... 18

Rosado v. National City Bank, 296 U.S. 497 12

Rosado v. Wyman, 414 F2 170 (2 Cir. - 1969) rev'd on *other grounds* 397 U.S. 397 (1970) 13,14,19,25

Shapiro v. Thompson, 394 U.S. 618 (1969) 22

State of Ga. v. Pennsylvania R. Co., 324 U.S. 439 (1945)..... 11

Swift & Co. v. Wickham, 382 U.S. 111 (1968) 26,27

Townsend v. Swank, 404 U.S. 282 (1971) 22,24,26

U.S. v. Price, 383 U.S. 787 (1966)..... 24

Vasquez v. Ferre, 404 F. Supp. 815 (D.N.J. - 1975) 8,16

Williams v. Wohlgemuth, 540 F2 163 (3 Cir. - 1976) 23

Yankee Network v. Federal Communication Comm., 107 F2 212 (D.C. Cir. - 1940) 11

Zwickler v. Koota, 389 U.S. 241..... 12

TREATISES CITED

Herzer, Harvard Civil Rights - Civil Liberties Law Review, Volume 6, No. 1, P. 1, Dec. 1970 "Federal Jurisdiction Over Statutorily Based Welfare Claims" 7

Cover, *Clearinghouse Review,* Feb.-Mar. 1969 p. 6 "Establishing Federal Jurisdiction in Actions Brought to Vindicate Statutory (Federal) Rights When No Violation of Constitutional Rights Are Alleged" 7,8,14

Note, *Columbia Law Review,* Volume 67 No. 1, p. 84 "Federal Judicial Review of State Welfare Practices".....7-8,10,11

F. Frankfurter & J. Landis *The Business of the Supreme Court* 65 12

Page

Chadbourn & Levin, *U. of Pa. L. Rev.,* Volume 90 p. 639 (1942) "Original Jurisdiction of Federal Questions" 12

Frankfurter, *Colum. L. Review,* Volume 47 p. 527 (1947) "Some Reflections on the Reading of Statutes".....15

Note, *Columbia Law Review,* Volume 72 No. 8, p. 1404 "Federal Jurisdiction Over Challenges To State Welfare Programs".....17

MISCELLANEOUS CITES

2 Cong. Rec. 129 (1973).....8

Senate Report 388 61st Cong. 2d Sess. p. 2 (1910)..... 9,10

103 Cong. Rec. 16620 (1957) 15

U.S. Code Cong. & Adm. News 85th Cong. 1st Sess. p. 1966, 1970 (1954).....15

45 C.F.R. 233.120 21

Public Law 94-38 (Aug. 12, 1976) 27

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5324

JULIA GONZALEZ, *etc.*,

Petitioner,

v.

JAMES F. YOUNG, DIRECTOR, HUDSON COUNTY WELFARE BOARD, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF PETITIONER

CITATIONS WITH RESPECT TO THE INSTANT CASE

Gonzalez v. Young, 418 F.Supp. 586 (D.N.J.—1976).
Gonzalez v. Young, 560 F_2 160 (3 Cir.—1977).

JURISDICTION OF THIS COURT

A petition for a writ of certiorari was filed on August 24, 1977. Certiorari was granted on February 21, 1978. Jurisdiction is conferred by 28 *U.S.C.* 1254(1).

STATUTES AND REGULATIONS INVOLVED

28 U.S.C.A. 1343(3) and (4), 1976 Ed. p. 310

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage of any right, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U.S.C.A. 1983, 1974 Ed. p. 250

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

U.S.C.A. Const. Art. VI cl. 2 1968 Ed. p. 715

This Constitution, and the Laws of the United States which shall be made in pursuance thereof, and all Treaties made or which shall be made, under the Authority of the United States shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

42 U.S.C.A. 606(e)(1), 1974 Ed. p. 126

The term "emergency assistance to needy families with children" means any of the following, furnished for a period of not in excess of 30 days in any 12 month period, in the case of a needy child under the age of 21 who is (or, within such period as may be specified by the Secretary, has been) living with any of the relatives, specified in subsection (a) (1) of this section in a place of residence maintained by one or more of such relatives as his or their own home, but only where such child is without available resources, the payment care or services involved are necessary to avoid destitution of such child, and such destitution or need for living arrangements did not arise because such child or relative refused without good cause to accept employment or training for employment:

(A) money payments, payments in kind, or such other payments as the State agency may specify with respect to, or medical care or any other type of remedial care recognized under State law on behalf of such child or any other member of the household in which he is living; and

(B) such services as may be specified by the Secretary but only with respect to a State whose State plan approved under section 602 of this title includes provision for such assistance.

New Jersey Administrative Code N.J.A.C. 10:82-5.12(c)(1), Volume 10 p. 228

Emergency Shelter: When an actual state of homelessness exists or is manifestly imminent, the county welfare board shall authorize payment of the actual cost of adequate emergency shelter arrangements at the most reasonable rate available for a specified temporary period not to exceed the calendar month following the month in which the state of homelessness first becomes known.

QUESTIONS PRESENTED

a) Is 42 *U.S.C.* 1983 an Act of Congress providing for equal rights of citizens as required by 28 *U.S.C.* 1343(3).
b) Is 42 *U.S.C.* 1983 an Act of Congress providing for the protection of civil rights as required by 28 *U.S.C.* 1343(4).
c) Does the Supremacy Clause satisfy the "secured by the Constitution" requirement of 28 *U.S.C.* 1343(3).

BASIS OF FEDERAL COURT JURISDICTION

Jurisdiction is in issue. Petitioners assert jurisdiction under 28 *U.S.C.* 1343(3) and (4). *See* also 42 *U.S.C.* 1983 and the Supremacy Clause, *U.S.C. Const.* Art. VI *cl.* 2.

STATEMENT OF THE CASE

On February 2, 1976 petitioner was set upon by a robber who stole all of her February, 1976 welfare funds. As a result petitioner and her two infants were rendered destitute without any money whatsoever for the remainder of February, 1976, specifically, without money to pay February, 1976 rent and utility accruals. Petitioner applied to her local welfare office for "emergency assistance" which was denied since New Jersey law required petitioner to be in an actual or imminent state of homelessness before emergency funds would be granted. *See N.J.A.C.* 10:82-5.12(c)(1). Petitioner then filed an action in U.S. District Court for the District of New Jersey alleging that the "homelessness" prerequisite in New Jersey law impermissibly narrowed the term "destitution" as the same is contained in the federal genesis of eligibility for welfare emergency assistance. *See* 42 *U.S.C.* 606(e)(1). Petitioner's complaint was ultimately dismissed by the 3rd Circuit on July 15, 1977 for want of jurisdiction. The 3rd Circuit held:

(a) 42 *U.S.C.* 1983 is not an Act of Congress providing for equal rights of citizens as required by 28 *U.S.C.* 1343(3);
(b) 42 *U.S.C.* 1983 is not an Act of Congress providing for the protection of civil rights as required by 28 *U.S.C.* 1343(4);
and (c) the Supremacy Clause does not satisfy the "secured by the Constitution" requirement of 28 *U.S.C.A.* 1343(3).

The underpinning of these holdings is that 1983 and 1343(3) and (4) are not coextensive. It was this perception which compelled us to file our petition for certiorari.

POINT I

42 U.S.C. 1983 AND 28 U.S.C. 1343(3) ARE COEXTENSIVE

42 *U.S.C.* 1983 and 28 *U.S.C.* 1343(3) germinated in the Civil Rights Act of 1871. There was no distinction between substance and jurisdiction contained in the Civil Rights Act of 1871. If there was a violation of the Act jurisdiction clearly reposed in federal court. The question projected *sub judice* is whether Congress has since 1871 created a gap between 42 *U.S.C.* 1983 and 28 *U.S.C.* 1343(3). Put differently the question is whether Congress has created the paradoxical situation in which some violations of the federal Civil Rights Act (substantive part 1983) are not redressable in federal court (jurisdictional part 1343(3)). We submit that our adversaries will argue however that a gap was created by the revisions to the progenitors of 1983 and 1343(3) which occurred in the years 1875 and 1911.

1875

In 1875 there was a codification change in the federal statutes. The various federal statutes were consolidated under separate titles in what has become the Revised Statutes. In the process the substantive provision of Section 1 of the 1871 Act became separated from its jurisdictional counterpart. Jurisdiction respecting substantive violations, that is, violations of the 1871 Act, was conferred on both the district courts and the circuit courts. However, in the grant to the circuit courts the language "an Act of Congress providing for equal rights" first appeared. It is this language

which our adversaries seize in support of their chasm theory. They say in effect that while the progenitor to 1983 created a substantive cause for transgressions of rights secured by federal statutes the progenitor to 1343(3) created a federal jurisdictional conduit only when the federal statute transgressed is a statute "providing for equal rights". In essence they argue that the term "equal rights" narrows those 1983 violations cognizable in federal court and they further argue that 1983 does not itself provide for equal rights. We submit that this perception is untenable.[1]

It is axiomatic that a court in interpreting statutes must enforce the legislative intent. *Burd v. McCullough*, 217 F_2 93 (3 Cir., 1958), *Gorin v. U.S.*, 111 F_2 712 (9 Cir. 1940). The majority of commentators who have studied the questions under consideration *sub judice* have concluded that the 1875 revision contains no evidence of a congressional intent to gap the progenitors of 1983 and 1343(3). *See Herzer, Harvard Civil Rights—Civil Liberties Law Review*, Volume 6, Number 1, Page 1, December 1970 "Federal Jurisdiction Over Statutorily Based Welfare Claims", Cover, *Clearinghouse Review* Feb.-March 1969 page 6 "Establishing Federal Jurisdiction in Actions Brought To Vindicate Statutory (Federal) Rights When No Violation of Constitutional Rights Are Alleged", Note

1. For heuristic purposes we will proceed as though the "equal rights" phraseology applied both to district and circuit courts. In point of fact the district court language in the 1875 revision did not contain the phrase "equal rights". Thus the coextensivity anent district courts and actions respecting 1983's predecessor was clearly established in 1875. This is very important since it is undisputed that: "Congress in 1875 also enlarged the scope of 1983's predecessor to protect rights secured by federal law as well as rights secured by the Constitution." *Lynch v. Household Finance Corporation*, 92 S.Ct. 1113, 1120 *n.* 15 (1972).

Columbia Law Review, Volume 67, Number 1, Page 84 "Federal Judicial Review of State Welfare Practices". The leitmotif which runs through these treatises was succinctly stated by Cover, *supra* at p. 5:

> In 1875 Congress revised and consolidated existing federal statutes formerly published as Statutes at Large into various titles collectively termed the Revised Statutes. *The primary object of the revision was to reorganize and restate the law rather than to change it.* (Emphasis added).

Resort to legislative history specifically the Congressional Record buttresses *Cover's* conclusion. *See* the following colloquy at 2 Cong. Rec. 129 (1873):

> Mr. Wood: Will there be anything in this revision of the laws that we have not already in the Statutes at Large.
>
> Mr. Poland: [Chairman of the Committee on Revisions] Nothing at least we do not intend there shall be.

Obviously there is no support in this exchange for the proposition that a significant jurisdictional modification was envisioned by Congress. Judicial nourishment for this perception is also readily available. *See Blue v. Craig*, 505 F_2 830 (4 Cir.—1974), *Gomez v. Florida State Employment Service*, 417 F_2 569 (5 Cir.—1969), *Vasquez v. Ferre*, 404 F.Supp. 815 (D.N.J.—1975), *Bomar v. Keyes*, 162 F_2 136 (2 Cir.) *cert. den.* 332 U.S. 825 (1947); *cf. Lynch v. Household Finance Corporation* 92 S.Ct. 1113 (1972) *note* 7. The *Vasquez* court appropriately characterized the 1875 revision at *p.* 824 of 404 F.Supp.:

> The purpose of the 1875 revision was not to effect substantive changes in the 1871 Act; but instead merely sought to divide it into separate jurisdictional and substantive statutes.

In light of all of the aforesaid we submit that the 1875 revision does not support the premise of the gap theorists.*

1911

In 1911 there was another revision of the federal statutes. Jurisdiction with respect to transgressions of the Civil Rights Act of 1871 was entirely removed from the circuit courts and was placed in the district courts. Problems arise because in the revision the troublesome "equal rights" language was placed in the district court jurisdictional grant. Be that as it may the relevant purpose that emerges from the legislative history of the 1911 revision substantiates the conclusion that Congress did *not* intend to gap 1983 and 1343(3). Thus Senate Report #388 61st Congress 2d Session p. 2 (1910) provides unequivocally:

> The changes proposed by the bill are generally of form rather than substance. Where the substance of the laws would appear to be changed it is generally because of the reorganization and consolidation of the law.

This clear statement certainly belies any perception that Congress in 1911 intended to gap 1983-1343(3). Moreover as noted previously in this brief during the 1875 revision the jurisdictional grant to the district courts was clearly coextensive with substantive actions respecting 1983's predecessor.[2] This is important in light of the following

* *Accord Ex. Bd. of Eng. Arc. & Sur. v. Flores De Otero*, 96 S.Ct. 2264 (1976).

2. This is so since the troublesome "equal rights" language was appended in 1875 only to the circuit court grant, not to the district court grant.

language from the Senate Report (388 61st Congress 2d Sess. pt. 1 at 15 (1910)) concerning the 1911 revision:

> This paragraph *merges* jurisdiction now vested in the district courts by paragraph 12 of section 563 and in the circuit courts by paragraph 16 of section 629 and vests it in the district courts. (Underlineage added.)

This language contains no clear indication that the district court jurisdictional component was vitiated in merger. To the contrary the more appropriate reading is that the district court jurisdictional component was retained in merger thus leaving no doubt as to the coextensivity of 1983 and 1343(3). Most commentators who have studied the 1911 revision have drawn this conclusion. Thus in the note at 67 *Columbia Law Review* 84 113 (1967) "Federal Judicial Review of State Welfare Practices" the author states:

> Certainly there is no evidence that Congress intended to diminish the prior jurisdiction of the district court. Indeed some of the brief legislative history suggests precisely the contrary—that the sole purpose was to remove any original civil rights jurisdiction from the circuit courts *and to vest in the district courts whatever jurisdiction had previously existed in the two courts.* (Emphasis added.)

Based on the foregoing we submit that neither the revision of 1875 nor the revision of 1911 illumine a Congressional intent to gap 1983 and 1343(3). Statutes *in pari materia*, such as 1983 and 1343(3), are to be construed with reference to each other, *Anderson v. Gladden*, 188 F.Supp. 666 (D.C. Or.—1960); are to be harmonized, *Day v. North Am. Rayon Corp.*, 140 F.Supp. 490 (D.C. Tenn.—1956); and are to be construed in light of the evil sought to be remedied. *Jones v. Ingling*, 191 F.Supp. 559 (D.C. Guam,

1961). The purpose underlying 1983 and 1343(3) and their predecessors was to provide a comprehensive federal remedy for transgressions of the substantive act. *See*, Cover *supra* at *pps.* 5-7. In light of this it would simply be absurd to hold in the face of that clear objective that Congress nonetheless neglected to provide federal jurisdiction over certain transgressions admittedly within both the perimeters and parameters of 1983 and its predecessors. This point was judicially echoed in *Blue v. Craig, supra* at *p.* 841 of 505 F_2:

> Only when there is no uncertainty should the courts conclude that Congress has set up a remedial system which overlooks nothing but the minor technicality of giving jurisdiction to some court. The courts should be especially reluctant to reach such a result where there is every evidence that a federal forum was a focal point of the legislation.

Since Congress enacted a legislative scheme of federal oversight anent civil rights transgressions it is absurd to argue that Congress did not provide coequal federal jurisdiction to redress those transgressions. Such an argument is clearly without merit. The courts cannot and will not impute to Congress an intent to produce in a statute an absurd result. *Yankee Network v. Federal Communication Commission*, 107 F_2 212 (D.C. Cir.—1940). It is equally vacuous to argue in the absence of an express repealer, that Congress impliedly repealed the 1871 coequal jurisdictional grant during the revisions of 1875 and 1911. The law is well settled that implied repealers are disfavored. *State of Ga. v. Pennsylvania R. Co.*, 324 U.S. 439 (1945) *rehearing den.* 65 S.Ct. 1018. This principle is of undeniable application in the present case. Indeed the

Supreme Court has recognized this. *See Lynch v. Household Finance Corporation, supra* at *pps.* 118 and 1120 of 92 S.Ct.:

> The broad concept of civil rights embodied in the 1866 Act and in the Fourteenth Amendment is unmistakably evident in the legislative history of Art. 1 of the Civil Rights Act of 1871, 17 Stat. 13, the direct lineal ancestor of 1983 and 1343(3).
>
> .....
>
> .....
>
> The 1875 Act giving the federal courts power to hear suits arising under Art. III Sec. 2 of the Constitution was, like the Act of 1871, an expansion of national authority over matters that before the Civil War, had been left to the States. F. Frankfurter and J. Landis The Business of the Supreme Court 65 (1928); *Zwickler v. Koota*, 389 U.S. 241, 245-248, 88 S.Ct. 391, 393-395, 19 L.Ed.2 444; Chadbourn & Levin, Original Jurisdiction of Federal Questions, 90 V. Pa. L. Rev. 639, 645 (1942). The Act therefore, is 'clearly' . . . part of, rather than an exception to, the trend of legislation which preceded it.' *Zwickler* supra. There was very little discussion of the measure before its enactment, in contrast to the extensive congressional debate that attended the passage of the Act of 1871. And there is, as a result, no indication whatsoever that Congress, in a rather hastily passed measure, intended to narrow the scope of a provision passed four years earlier as part of major civil rights legislation.
>
> The 'cardinal rule that repeals by implication are not favored' *Rosado v. National City Bank*, 296 U.S. 497, 503, 56 S.Ct. 349, 352 80 L.Ed. 351, *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 437, 88 S.Ct. at 2202; thus counsels a refusal to pare down 1343(3) jurisdiction—and the substantive scope of 1983—by

> means of the distinction between personal liberties and property rights, *or in any other way.* The statutory descendants of Art. 1 of the Civil Rights Act of 1871 must be given the meaning and sweep that their origin and their language dictate. (Emphasis added).

What could be clearer. 1343(3) and 1983 are not to be pared down by use of semantical diversions or distended analytical processes. Certainly this admonition applies to the propounders of a gap theory, particularly given their complete inability to show clear congressional germination or ideation respecting a gap. In point of fact Congress never intended a gap. 1343(3) and 1983 are coextensive. When there is a violation which falls within the ambit of the 1983 jurisdiction to redress the transgression reposes in the federal district courts by virtue of 1343(3).[3]

Before concluding this point we note that our adversaries are likely to rely on a series of cases including *Rosado v. Wyman*, 414 F_2 170, 181 (2 Cir., 1969) *rev'd. on other grounds* 397 U.S. 397 (1970), *McCall v. Shapiro*, 416 F_2 246 (2 Cir. 1969), and *People of State of New York v. Galamision*, 342 F_2 255 (2 Cir. 1965) *cert. den.* 85 S.Ct. 1342 (1966) for the proposition that a gap was created. Our response is fourfold: *First,* the rationales ununciated *supra,* in the treatises and in the cases cited are far more persuasive than those of the *Rosado* line; *Second, Rosado,* itself, was overly concerned with the welfare case-floodgate theory, a theory entirely discredited by the

3. Still another approach which impacts the gap theorists was set forth in *Vasquez* and *Blue, viz*: the actual words "equal rights" carried in 1875 no restrictive denotation or connotation and accordingly in its broadness the phrase "equal rights" easily embraced all substantive transgressions. *See* also *Ex. Bd. of Eng., Arch. and Sur. v. Flores De Otero*, 96 S.Ct. 2264 (1976).

Supreme Court in the *Rosado* appeal at 90 S.Ct. 1222; *Third, McCall* was foundated on a proprietary-personal liberty dichotomy later vacated by the Supreme Court in *Lynch v. Household Finance Corporation, supra.* at p. 1121; *Fourth, Galamision* was entirely a removal case thus bringing to the fore factors not present *sub judice*, to wit: friction between federal and state sovereignties and the restricted application of removal to the civil rights area.

POINT II

42 U.S.C. 1983 and 28 U.S.C. 1343(4) ARE COEXTENSIVE

1343(4) was enacted with the Civil Rights Act of 1957. It provides that "district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person to recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights . . ." Since there can be no doubt that 1983 is an act of Congress providing for the protection of civil rights, see *Cover, Clearinghouse Review* Feb.-Mar. 1969 "Establishing Federal Jurisdiction in Actions Brought to Vindicate Statutory (Federal) Rights When No Violations of Constitutional Rights Are Alleged", it would seem that the case for the coextensivity of 1983 and 1343(4) is made. However we anticipate that our adversaries will argue that 1343(4) does not implicate statutes, such as 1983, enacted prior to 1957. Whatever surface appeal this argument may have had at one time it has now been laid to rest by the Supreme Court decision in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). In *Jones* the court sanctioned the use of 1343(4) as a

jurisdictional conduit for transgressions of the Civil Rights Act of 1866. In light of this decision there is no longer any merit to the "antedate position". Moreover, the legislative history of 1343(4) supports *Jones. See* 103 Cong. Rec. 16620 (1957) where then Senate majority leader, Lyndon Johnson, describing 1343(4) said:

> [it] [e]xtends the jurisdiction of the district court to include any civil action begun to recover damages or to secure equitable or other relief under any act of Congress providing for the protection of civil rights . . . (Emphasis added).

Certainly it is sheer fantasy to posture the "antedate argument" in the face of clear Congressional intent to extend jurisdiction to *any* act of Congress providing for the protection of civil rights.

In addition the general thrust of the 1957 Civil Rights Act provides further nourishment for this thesis. The general thrust of a statute is relevant to determining the meaning to be given to one of its sections. *See* Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 539 (1947). Apart from the one voting provision in Part IV, 71 Stat. 637, the Act was entirely a procedural one, establishing a Commission on Civil Rights, Part 1, 71 Stat. 634, an additional Assistant Attorney General to concentrate on civil rights enforcement, Part II, 71 Stat. 637, and specific enforcement authority in the voting area for the Attorney General, Part 1 L. 71 Stat. 637. As the House Report indicates "[t]he provisions of the bill H.R. 6127 are designed to achieve a more effective enforcement of the rights guaranteed by the Constitution and laws of the United States" U.S. Code Cong. & Adm. News 14 Rep. 29, 85th Cong. 1st Sess., 1966, 1970 (1954). Certainly use

of the phrase "a more effective enforcement of the rights guaranteed by the Constitution and laws of the U.S." eviscerates the central rationale of our adversaries "antedate position". *Accord Gomez v. Florida State Employment Service*, 417 F_2 569 (5 Cir.—1969); *Vasquez v. Ferre*, 404 F.Supp. 815 (D.N.J.—1975) *cf. Moore v. County of Alameda*, 411 U.S. 693 (1973). The *Gomez* court flat out stated at p. 580 of 417 F_2 *n.* 39 that: "1343(4) does provide jurisdiction for all claims stated under 1983. The *Vasquez* court, incorporating *Jones* held at p. 825 of 404 F.Supp:

> The decision of the Supreme Court in *Jones v. Alfred H. Mayer Co.* 392 U.S. 409, 88 S.Ct. 2186 provides support for the view that statutes such as 1983 are among those acts providing for the protection of civil rights within the meaning of 1343(4).[4]

Despite the aforesaid we anticipate that our adversaries will rely on *McCall v. Shapiro*, 416 F_2 246 (2 Cir.—1969) and *Almenares v. Wyman*, 453 F_2 1075 (2 Cir., 1971) *cert. den.* 405 U.S. 544 (1972) for the proposition that 1343(4) does not implicate 1983 in the context of a welfare challenge under the Social Security Act. Our response is fourfold: *First*, the rationales enunciated by the courts in *Jones, Gomez, Blue*, and *Vasquez* are more persuasive than those stated in *McCall* and *Shapiro*; *Second, McCall* rests to a large degree on the property right-personal liberty dichotomy later struck by the Supreme Court in *Lynch*; *Third*, McCall is further foundated on the assertion that the Social Security Act is not an Act of Congress providing for

4. *Accord. Blue v. Craig*, 595 F_2 830 (4 Cir.—1974): "1983 is historically and textually a civil rights act—certainly 1983 is an act of Congress providing for the protection of civil rights" p. 842.

civil rights; however, even assuming *arguendo* this to be true it does not at all impinge on the conclusion that 1983 is itself an Act of Congress providing for the protection of civil rights; *Fourth, Almenares* is so elliptical and so laden with dicta that one cannot honestly conclude whether it is predicated on the second error of *McCall* or on a misinterpretation of 1343(4). *See* Note 27 *Columbia Law Review* Volume 72 #8 1404, 1427 "Federal Jurisdiction Over Challenges To State Welfare Programs".

In conclusion we assert that the "antedate argument" is without merit and we further assert that 1983 is undisputedly an Act of Congress providing for the protection of civil rights within the ambit and intendment of 1343(4). Accordingly when there is a violation which falls within the purview of 1983 jurisdiction to redress the transgression reposes in the federal district courts by virtue of 1343(4).

POINT III

SINCE 1343(3), 1343(4) AND 1983 ARE COEXTENSIVE JURISDICTION IS ESTABLISHED IN THE INSTANT CASE EVEN ACCEPTING ARGUENDO THE PREMISE THAT THE SOCIAL SECURITY ACT IS NOT AN ACT OF CONGRESS PROVIDING FOR EQUAL RIGHTS OR FOR THE PROTECTION OF CIVIL RIGHTS

We anticipate that our adversaries will argue that federal jurisdiction is wanting in the matter *sub judice* even if 1343(3), 1343(4) and 1983 are coextensive because the Social Security Act is neither an Act of Congress providing,

for equal rights nor an Act of Congress providing for the protection of civil rights. We concede that there is ample authority for the proposition that the Social Security Act is not an Act of Congress providing for equal rights or for the protection of civil rights. *See Andrews v. Maher*, 525 F_2 113, 118 (2 Cir., 1975), *Randall v. Goldmark*, 495 F_2 356 (1 Cir. - 1974), *Aguayo v. Richardson*, 473 F_2 1090, 1101 (2 Cir.) *cert. den. sub nom Aguayo v. Weinberger*, 414 U.S. 1146 (1974). Nonetheless, as discussed *supra* in this brief, 1983 is an Act of Congress providing for equal rights and for the protection of civil rights. *See Gomez v. Florida State Employment Service*, supra at *p.* 580 *n.* 3a of 417 F_2:

> .... 1983, although operating as a conduit through which other statutory rights are protected is itself an Act of Congress providing for the protection of civil rights.

See further *Blue v. Craig*, supra at *p.* 842 of 505 F_2:

> The Court in that case [McCall] bluntly declared that '[T]he Social Security Act is not one providing for the protection of civil rights'.... The difficulty with the conclusion is that it overlooks the fact that while the alleged illegality of the deprivation complained of finds its warrant in the Social Security Act, the actual cause of action is granted not by the Social Security Act but by 1983....

In sum we assert that 1983 connects directly to 1343(3) and (4) since it is itself an act of Congress providing for equal rights and for the protection of civil rights.[5] That

5. Our adversaries argument that jurisdiction is wanting because the Social Security Act does not provide for equal rights or for the protection of civil rights is specious and if true would completely vitiate

(continued)

being so the only inquiry remaining is whether a claim under the Social Security Act falls within the ambit of 1983. Put differently the remaining inquiry is whether 1983 embraces a wholly statutory claim. Clearly it does. The word "and" in the phrase "secured by the Constitution and laws" contained in 1983 is disjunctive. It is thus undisputed that 1983 embraces a wholly statutory right. *See Peacock v. City of Greenwood*, 384 U.S. 808 (1964), *Bomar v. Keyes*, 162 F_2 136, 138-139 (2 Cir.) *cert. den.* 332 U.S. 825 (1947) *cf. Monroe v. Pape*, 365 U.S. 167 (1961), *Lynch v. Household Finance Corp.*, supra.

We conclude by noting that the positions that we have taken in this brief are entirely in harmony with the principles of federalism and with practicality. A main function of the federal courts is to vindicate federal rights. This is certainly no less true in the area of AFDC welfare payments where more than 75% of the financial burden is borne by the federal government. Indeed the Supreme Court recently embraced this view in *Rosado v. Wyman*, 397 U.S. 397, 90 S.Ct. 1207 (1970) at 1223:

> [W]e find not the slightest indication that Congress meant to deprive federal courts of their traditional jurisdiction to hear and decide federal questions in this field [welfare]....
> It is ... peculiarly part of the duty of this tribunal no less in the welfare field than in other areas of the law, to

(footnote continued from preceding page)

1983. If the Social Security Act did in fact provide for equal rights or for the protection of civil rights it would plug directly into 1343(3) and (4). There would be no need for 1983. But if you accept our adversaries argument 1983 ... o serves no function if the Social Security does not provide for equal rights or for the protection of civil rights. Such a reading renders 1983 completely sterile. We submit that this is entirely unacceptable.

> resolve disputes as to whether federal funds allocated to the States are being expended in consonance with the conditions that Congress has attached to their use. As Mr. Justice Cardozo stated speaking for the court in *Helvering v. Davis*, 301 U.S. 619, 645, 57 S.Ct. 904, 910, 81 L.Ed. 1307 (1937): 'When [federal] money is spent to promote the general welfare the concept of welfare is shaped by Congress, not the states' *cf. Lassen v. Arizona, ex rel. Arizona Highway Dept.* 385 U.S. 458, 87 S.Ct. 584, 17 L.Ed.2 515 (1967).[6]

The above statement, attractive on its own, becomes even more attractive when one views it in concert with other factors that militate in favor of federal jurisdiction: 1) federal courts have an expertise in the nuances of federal law that state courts cannot match; 2) federal rights should not vary with state geographic considerations; 3) there is an inherent potential for bias when state judges are compelled to review direct monetary decisions (particularly welfare decisions) of other state officials. In short the assumption of jurisdiction *sub judice* is desirable from the standpoint of practicality and further is completely in harmony with the guiding principles of federalism.

POINT IV

PETITIONER'S COMPLAINT PRESENTS A SUBSTANTIAL CONSTITUTIONAL CLAIM UNDER UNITED STATES CONSTITUTION ART. 6 CL. 2 WHICH IS JURISDICTIONALLY COGNIZABLE UNDER 28 U.S.C. 1343(3).

6. The underlying claim at bar is with respect to AFDC emergency assistance which is funded almost entirely by the federal government.

A. Petitioners complaint presents a constitutional claim within the meaning of 28 U.S.C. 1343(3).

The within action was brought under 42 U.S.C. Sec. 1983 seeking to restrain respondents, county and state welfare officials from enforcing a New Jersey regulation, N.J.A.C. 10:82-5.12 alleged to be in conflict with the Social Security Act Sec. 606(e)(1), 42 U.S.C. 606(e)(1) and 45 C.F.R. 233.120 thereby depriving petitioners of a right secured by Article VI Cl. 2, the Supremacy Clause, of the United States Constitution.

Article VI Cl. 2 of the Constitution provides as follows:

> "This Constitution, and the Laws of the United States which shall be made in pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any thing in the Constitution or Law of any State to the contrary notwithstanding."

Petitioners recognize that 42 U.S.C. 1983 does not of itself confer jurisdiction for deprivation of rights secured by the Constitution and therefore rely on 28 U.S.C. 1343(3) which in pertinent part provides:

> "The District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * * * *
>
> (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"

Jurisdiction under 28 U.S.C. 1343(3) has been found by this court in several cases involving welfare claims where relief has been sought under 42 U.S.C. 1983 to restrain state officials from enforcing a state statute or regulation alleged to violate the Constitution, see *Dandridge v. Williams*, 397 U.S. 471 (1970); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

Although the aforementioned cases have involved the more frequently pleaded constitutional violations of due process and equal protection under the Fourteenth Amendment, this court has long ago recognized that where a claim is made that a statute or regulation conflicts with or is pre-empted by federal law a constitutional issue under the Supremacy Clause is involved. See *Gibbons v. Ogden*, 9 Wheat 1, 6 L. Ed. 23 (1824).

In two recent cases under 42 U.S.C. 1983 involving substantive welfare claims this court has affirmed the principle. *Townsend v. Swank*, 404 U.S. 282 (1971), *Carleson v. Remillard*, 406 U.S. 598 (1972). In *Townsend*, Supra, at 286 a challenge was made to the validity of the Illinois law excluding from AFDC benefits needy dependent children 18 through 20 years old who were attending college or university. Justice Brennan speaking for a unanimous court said, "We hold that the Illinois statute and regulations conflict with Sec. 406(a)(2)(b) and for that reason are invalid under the Supremacy Clause". In *Remillard*, supra, 406 U.S., at 601 a challenge was made to California's welfare law which excluded absence because of military service from the definition of "continued absence" for purposes of welfare eligibility. Justice Douglas, for a unanimous court, said: "If California's

definition conflicts with the federal criterion then it, too, is invalid under the Supremacy Clause". Also in *Williams v. Wohlgemuth*, 540 F.2d 163, 170 (1976) where the facts are identical to the case at bar the court stated, "We thus conclude that the emergency assistance plan established by the Commonwealth of Pennsylvania, by confining the right to receive such assistance to those persons whose emergencies were caused by civil disorder or natural disaster, is not congruent with the Social Security Act. As such, it is invalid under the Supremacy Clause of the Constitution".

Petitioners recognize that in each of these cases the court did not specifically pass on the question of whether the Supremacy Clause comes within the "secured by the Constitution" language of 28 U.S.C. 1343(3) for purposes of federal jurisdiction. In fact this court has noted the issue in *King v. Smith*, 392 U.S. 309 at 312 N.3; "We intimate no views as to whether and under what circumstances suits challenging state AFDC provisions only on the ground that they are inconsistent with the federal statutes may be brought in Federal Court".

Also in *Hagans v. Lavine*, 415 U.S. 533, N.5 (1973) the court was aware that a federal-state conflict, although categorized as statutory, was in reality a constitutional claim arising under the Supremacy Clause which might be jurisdictionally cognizable under Sec. 1343(3). The court however found it unnecessary to deal with the issue in that case stating that "It is therefore urged that the 'secured by the constitution' language of Sec. 1343(3) should not be construed to exclude Supremacy Clause issues. That question we leave for another day".

Although these cases indicate that this court has yet to make a specific finding regarding a Supremacy Clause issue

supporting 1343(3) jurisdiction, the court's prior decision in *Townsend, Remillard* and *Hagans* inevitably lead to this conclusion. These cases have defined federal-state conflict or pre-emption claims as grounded in the Supremacy Clause of the Constitution.

Furthermore there is nothing in the language of the statute or existing case law that limits the kind of nonfrivolous constitutional claims which would qualify as 'secured by the constitution' for purpose of jurisdiction under 1343(3). Attempts to carve out a distinction between personal and proprietary rights secured by the Constitution as found in Justice Stone's opinion in *Hague v. CIO*, 307 U.S. 496, 531 (1939) and in *Eison v. Eastman*, 421 F.2d 960, 563 (1969) were laid to rest in *Lynch v. Household Finance Corporation*, 405 U.S. 538, 549 (1970) which rejected that approach on the basis that "people—not property—have rights".

Justice Stewart in discussing that legislative history and scope of 1343(3) said:

> "The 'cardinal rule . . . that repeals by implication are not favored", *Pasadas v. National City Bank*, 296 U.S. 497, 503; *Jones v. Mayer Co.*, 392 U.S., at 437, thus counsels a refusal to pare down Sec. 1343(3) jurisdiction—and the substantive scope of Sec. 1983—by means of the distinction between personal liberties and property rights, or in any other way. The statutory descendants of Sec. 1 of the Civil Rights Act of 1871 must be given the meaning and sweep that their origins and their language dictate".

The court, in a footnote, cited with approval from *United States v. Price*, 383 U.S. 787, 797 (1966) where that court interpreted the phrase "rights, privileges, or immunities secured . . . by the Constitution or laws of the United

States", contained in 18 U.S.C. Sec. 242, to embrace "*all* of the Constitution and laws of the United States". *Lynch*, 405 U.S. at 549, N.16.

Lower Federal Court support for the argument that the Supremacy Clause issue comes within 1343(3) jurisdiction can be found in *Blue v. Craig*, Supra. at 842-844 (4th Cir. 1974) and in *Connecticut Union of Welfare Employees v. White*, 55 F.R.D. 481, 486 (Conn. 1972). In *Blue*, a 1983 claim was brought alleging that the state plan for medical assistance deprived recipients of aid secured them by the Social Security Act and Regulations. The Appeals Court found several grounds for jurisdiction under 28 U.S.C. 1343(3) and (4) stating that a federal-state conflict gives rise to a constitutional issue under the Supremacy Clause which is jurisdictionally cognizable under 28 U.S.C. 1343(3). The Appeals Court reviewed the Supreme Court cases involving the Supremacy Clause and concluded that their decisions "point inescapably to the conclusion 'that the secured by the constitution' language of Sec. 1343(3) should not be construed to exclude Supremacy Clause issues". The District Court in the *Connecticut Union* case in discussing the jurisdictional issues involved under 1343(3), while constrained to follow its own Appeals Court in *Rosado v. Wyman*, 414 F.2d 170 said: "It seems to me that a compelling case can be made for the proposition that jurisdiction is properly grounded on Sec. 1343(3). If the state policy is in conflict with the federal statute, as alleged in the complaint, this would deny plaintiff a right secured by the Constitution—namely, the right to secure the benefit of the Supremacy Clause".

The court below in the case at bar relied on *Andrews v. Maher*, 525 F.2d 113 (2d Cir. 1975) in support of its

conclusion that when a claim is made that a state statute or regulation conflicts with federal law, it is not cognizable under 28 U.S.C. 1343(3) as a deprivation of rights "secured by the Constitution".

Petitioners contend that this reliance is misplaced and that the application of the standards previously expressed by this court requires a reversal of the lower court decision. The reasoning in *Andrews* is faulty on several counts. It rejected, contrary to the weight of Supreme Court authority in *Townsend, Remillard* and *Hagans* the principle that a federal-state conflict claim gives rise to a constitutional issue under the Supremacy Clause.

Instead *Andrews* cites *Swift & Co. v. Wickham*, 382 U.S. 111 (1968) as authority for the proposition that "the Supreme Court rejected a similar attempt to construe statutory claims as Supremacy Clause (and therefore constitutional) claims in the context of 28 U.S.C. 2281". The court in *Andrews* has misconstrued *Swift*, which in reality held that "Any such preemption or conflict claim is of course grounded in the Supremacy Clause of the Constitution, if a measure conflicts with a federal requirement, the state measure must give way". *Swift* did not find federal-state conflict claims to be non-constitutional claims, to the contrary, it created a constitutional exception to the three judge court statute, 28 U.S.C. Sec. 2811 for policy reasons which had their genesis in the establishment of the three judge court statute. Justice Harlan in writing for the majority in *Swift* said, "Section 2281 was designed to provide a more responsible forum for the litigation of suits which, if successful, would render void state statutes embodying important state policies". The court in *Swift* did not consider a conflict between a federal

regulation, applying to labeling of total net weight on frozen stuffed turkeys, and a New York statute requiring a different net weight figure, to be sufficiently important an issue to require the collective judgment of three federal judges, and therefore left it and similar federal-state conflict issues to the jurisdiction of a single federal judge.

The court in *Andrews* would have us believe that *Swift* by analogy stands for the proposition that Supremacy Clause claims are not constitutional questions for purposes of federal jurisdiction under 1343(3). Because Supremacy Clause claims did not require the convening of a three judge court under Sec. 2281, it does not follow that a single judge should not find Civil Rights jurisdiction under Sec. 1343(3) which has been liberally interpreted by the court.

With the repeal of the three Judge Court Statute Public Law 94-38 (August 12, 1976) all constitutional challenges, be they Supremacy Clause issues, or otherwise are now heard by a single-federal judge except in limited circumstances not applicable here.

B. Petitioners constitutional claim is of sufficient substance to support federal jurisdiction under 28 U.S.C. 1343(3).

The test of substantiality has been clearly set forth in several cases of this court, *Baker v. Carr*, 369 U.S. 186 (1962), *Goosby v. Ossner*, 409 U.S. 512 (1973) and *Hagans v. Levine*, supra. Justice Brennan speaking for the majority in *Baker*, supra at 189, regarding the constitutional issues raised in the Complaint said, "Dismissal of the Complaint upon the ground of lack of jurisdiction of the subject matter would, therefore, be justified only if that

claim were so attenuated and unsubstantial as to be absolutely devoid of merit or frivolous, that the claim is unsubstantial must be very plain". And the court in *Hagans*, supra, in discussing what constitutes a substantial constitutional claim for purposes of determining the threshold question of jurisdiction under 28 U.S.C. 1343 quotes at length approvingly from the *Goosby* decision:

> "Constitutional insubstantiality' for this purpose has been equated with such concepts as 'essentially fictitious; *Bailey v. Patterson*, 369 U.S., at 33; 'wholly insubstantial'. ibid; obviously frivolous'; *Hannis Distilling Co. v. Baltimore*, 216 U.S. 285, 288 (1910); and 'obviously without merit; *Ex parte Paresky*, 290 U.S. 30, 32 (1933). The limiting words 'wholly' and 'obviously' have cogent legal significance. In the context of the effect of prior decisions upon the substantiality only if the prior decisions unescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. Sec. 2281. A claim is insubstantial only if 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy'."
> Id., at 538 (citations omitted).

Petitioners contend that application of the *Goosby* standards to the Supremacy Clause argument presented in the Complaint, clearly demonstrate that the claim is substantial. The Appeals Court below erroneously held that the constitutional claim was insubstantial. Circuit Judge Aldisert speaking for the court below said, "We conclude

that jurisdiction must rest on a constitutional claim of sufficient substance; independent of statutory conflicts under the Supremacy Clause."

In support of the lack of constitutional substantiality the court relied on the Second Circuit case in *Andrews v. Maher*, supra while cognizable that another circuit of equal persuasion had held otherwise, *Blue v. Craig*, supra. Under *Goosby*, where a conflict in the circuits is involved, the claim would not be frivolous. At most it would be considered doubtful, but even if doubtful it would survive a jurisdictional attack on the question of constitutional substantiality and therefore should be decided on the merits.

CONCLUSION

The court should hold:

1) 42 *U.S.C.* 1983 is an Act of Congress providing for equal rights of citizens as required by 28 *U.S.C.* 1343(3).

2) 42 *U.S.C.* 1983 is an Act of Congress providing for the protection of civil rights as required by 28 *U.S.C.* 1343(4).

3) Since 1343(3), 1343(4) and 1983 are coextensive jurisdiction is established in the instant case even accepting *arguendo* the premise that the Social Security Act is not an Act of Congress providing for equal rights or for the protection of civil rights.

4) The Supremacy Clause satisfies the "secured by the Constitution" requirement of 28 U.S.C. 1343(3) thus providing an alternative basis for jurisdiction.

The judgment of the 3rd Circuit directing that the complaint be dismissed for want of jurisdiction should be reversed.

Respectfully submitted,

HUDSON COUNTY LEGAL SERVICES
Timothy K. Madden, Director

By: /s/ Theodore A. Gardner
Theodore A. Gardner

By: /s/ William E. McAlvanah
William E. McAlvanah

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

FILED
MAY 12 1978
MICHAEL RODAK, JR., CLERK

No. 77-5324

JULIA GONZALEZ, individually and as Guardian Ad Litem for LUIS GONZALEZ, Age 9, and MANUEL GONZALEZ, age 10, and Further On Behalf of All Persons Similarly Situated,

Petitioners,

v.

JAMES F. YOUNG, Director, Hudson County Welfare Board, and G. THOMAS RITI, Director, New Jersey Division of Public Welfare,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT G. THOMAS RITI, DIRECTOR, NEW JERSEY DIVISION OF PUBLIC WELFARE

JOHN J. DEGNAN,
Attorney General of New Jersey,
Attorney for Respondent G. Thomas Riti, Director, New Jersey Division of Public Welfare,
State House Annex,
Trenton, New Jersey 08625.

STEPHEN SKILLMAN,
Assistant Attorney General,
Of Counsel.

RICHARD M. HLUCHAN,
Deputy Attorney General,
On the Brief.

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	2
STATUTES INVOLVED	2
COUNTER-STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT:	
Point I—Since a resolution of petitioner's claim involves only the construction of conflicting Federal and State laws, and does not require any inquiry into the construction, operation or effect of the Supremacy Clause, petitioner's claim is not a substantial constitutional claim arising under, or secured by, the Supremacy Clause	8
Point II—Since the Social Security Act does not "provide for equal rights," petitioner is precluded from utilizing the remedial provisions of the Civil Rights Act of 1871 to compel the payment of Social Security Act benefits	19
Point III—Since the public assistance benefits sought by petitioner are not secured by any "act of Congress providing for the protection of civil rights," the district court lacked jurisdiction to consider petitioner's claim	41
CONCLUSION	45

PAGE

Cases Cited

Allen v. Bd. of Elections, 393 U.S. 544 (1969) 43

Andrews v. Maher, 525 F.2d 113 (2d Cir. 1975) 14

Antoine v. Washington, 420 U.S. 194 (1975..) 12

Baines v. City of Danville, 357 F.2d 756 (4th Cir). aff'd 384 U.S. 890 (1966) 36

Bell v. Hood, 327 U.S. 678 (1946) 10, 12

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) 38

Bowman v. Chicago & N. R. Co., 115 U.S. 611 (1885) 38

Bomar v. Keyes, 162 F.2d 136 (2d Cir.), cert. denied 322 U.S. 825 (1947) 38, 39

Califano v. Mandley, No. 76-1416 (U.S. cert. granted June 6, 1977) 12, 19

California ex rel. McColgan v. Bruce, 129 F.2d 421 (9th Cir. 1942), cert. denied 317 U.S. 678 (1942) 16

Cantwell v. Connecticut, 310 U.S. 296 (1940) 37

Carqueville v. Woodruff, 153 F.2d 1011 (6th Cir. 1946) 16

Carter v. Greenhow, 114 U.S. 317 (1884) 16

Chicago & Alton R. Co. v. Wiggins Ferry Co., 108 U.S. 18 (1883) 15

Cohens v. Virginia, 6 Wheat. 379 (1821) 10

Cruz v. Beto, 405 U.S. 319 (1972) 37

Dandridge v. Williams, 397 U.S. 471 (1970) 34

District of Columbia v. Carter, 409 U.S. 418 (1973) 20, 21, 23, 37, 38

PAGE

Douglas v. Jeanette, 319 U.S. 157 (1943) 37

Edwards v. South Carolina, 372 U.S. 229 (1963) 37

Essex County Welfare Board v. Department of Institutions and Agencies, 75 N.J. 232 (1978) 41

Examining Board v. Flores de Otero, 426 U.S. 572 (1976) 20, 30, 33, 34

Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73 (1960) 18

Georgia v. Rachel, 384 U.S. 780 (1966) 24, 33, 34, 35, 36

Gideon v. Wainwright, 372 U.S. 335 (1960) 37

Gonzalez v. Young, 418 F. Supp. 566 (D. N.J. 1976) 4, 8, 9, 19

Gonzalez v. Young, 560 F.2d 160 (3d Cir. 1977) 5, 14

Greenwood v. Peacock, 384 U.S. 808 (1966) 24

Gully v. First Nat. Bank, 299 U.S. 109 (1936) 10

Hagans v. Lavine, 415 U.S. 528 (1974) 9, 10, 12, 18, 20, 31, 44

Hague v. CIO, 307 U.S. 496 (1938) 17, 25, 31

Hazen Research, Inc. v. Omega Minerals, Inc., 497 F.2d 151 (5th Cir. 1974) 16

Holdt v. Indiana Manuf. Co., 176 U.S. 68 (1900) 16, 38

Insular Police Commission v. Lopez, 160 F.2d 673 (1st Cir.), cert. denied 331 U.S. 855 (1947) 39

Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) 23, 25, 43, 44

Lavine v. Milne, 424 U.S. 577 (1976) 34

Little York Gold Washing and Water Co. v. Keyes, 96 U.S. 199 (1878) 10

PAGE

Logan v. United States, 144 U.S. 263 (1892) 17

Luterman v. Levin, 318 F. Supp. 11 (D. Md. 1971) 16

Lynch v. Household Finance Corp., 405 U.S. 538 (1972) 21, 22, 25, 27, 31

Maher v. Roe, 432 U.S. 464 (1977) 34

Mahone v. Waddle, 564 F.2d 1018 (3rd Cir. 1977), petition for cert. filed No. 77-731 (U.S. November 23, 1977) 24

Mapp v. Ohio, 367 U.S. 643 (1961) 37

McGuire v. Amrein, 101 F. Supp. 414 (D. Md. 1951) 39

Minnesota v. Northern Securities, 194 U.S. 48 (1904) 15, 16

Mitchum v. Foster, 407 U.S. 225 (1972) 31, 42

Monroe v. Pape, 365 U.S. 167 (1961) 26, 42

Newburyport Water Co. v. Newburyport, 193 U.S. 561 (1904) 10

New Orleans v. Benjamin, 153 U.S. 411 (1894) 10

Osborn v. Bank of U.S., 9 Wheat. 738 (1824) 10

Paul v. Davis, 424 U.S. 693 (1976) 32

Quern v. Mandley, No. 76-1159 (U.S. cert. granted June 6, 1977) 12, 19

Schatte v. Int. Alliance of Theatrical Stage Employees, 182 F.2d 158 (9th Cir. 1950) 39

Shapiro v. Thompson, 394 U.S. 618 (1969) 34

Swift & Co. v. Wickham, 382 U.S. 111 (1965) 11, 13, 18

Tenney v. Brandhove, 341 U.S. 367 (1951) 37

PAGE

United States v. Guest, 383 U.S. 745 (1966) 17

Walker v. Bank of America, 268 F.2d 16 (9th Cir.), cert. denied 361 U.S. 903 (1950) 39

United States Constitution Cited

Article IV, Section 1 ..... 14, 15

Article VI, Clause 2 10

Thirteenth Amendment 21, 24, 25

Sec. 2 24

Fourteenth Amendment 5-6, 25, 27-30, 32, 34, 36, 37, 40, 42

Sec. 1 25

Sec. 2 25

Statutes Cited

Act of March 3, 1875, 18 Stat. 470:

Sec. 1 32

Act of March 3, 1911, 36 Stat. 1087 31

Civil Rights Act of 1866, 14 Stat. 27 ..... 5, 22, 24, 25, 27, 29, 32, 33, 35, 36, 42-44

Sec. 1 ..... 22, 24, 26, 28, 35, 42

Sec. 2 ..... 23, 27, 28

Sec. 3 ..... 23, 24, 34, 35

Civil Rights Act of 1871, 17 Stat. 13 ..... 5, 19, 20, 27, 31, 32

Sec. 1 ..... 26-31, 33, 34, 36

PAGE

Enforcement Act of May 31, 1870, 16 Stat. 140 ....25, 29, 33
Secs. 16-18 25
N.J.S.A. 44:7-18 41
N.J.S.A. 44:10-2 41
Revision of Statutes Act of 1866, 14 Stat. 75 30
Sec. 3 34
Revision of Statutes Act of 1874, 18 Stat. 113 30
Sec. 2 30
Rev. Stat.:
Sec. 563(12) 31
Sec. 629(16) 30-32, 35
Sec. 1979 30-33
Social Security Act:
Sec. 40(e) 3, 4, 7, 8, 11, 12, 17, 19, 43
28 U.S.C.:
Sec. 1331 ..... 18, 28
Sec. 1331(a) 7, 32, 38
Sec. 1332 18
Sec. 1343 ..... 2, 4-5, 37-38, 43
Sec. 1343(3) 2, 4-7, 9, 16-18, 20, 26, 30, 33-36, 39-41, 43, 44

PAGE

28 U.S.C.:
Sec. 1343(4) 4
Sec. 1443(1) 34
Sec. 2281 13
42 U.S.C.:
Sec. 601 ..... 3, 18
Sec. 602(a)(4) 41
Sec. 604 41
Sec. 606(e) 3, 8, 12, 19
Sec. 1302(a)(1) 38
Sec. 1381 18
Sec. 1396 18
Sec. 1397 18
Sec. 1982 ..... 43, 44
Sec. 1983 ..... 2, 4-9, 20, 26, 30-34, 36-44

Regulation Cited

N.J.A.C. 10:82-5.12(c)(1) 3, 8

Rule Cited

N.J. Ct. R. 2:2-3(a)(2) 41

PAGE

Other Authorities Cited

Bator, Mishkin, Shapiro and Wechsler, Hart & Wechsler's The Federal Courts and the Federal System (2nd ed. 1973):
846 24

Comment, The Civil Rights Act and Mr. Monroe, 49 Calif. L. Rev. (1961):
145, 148 42

Cong. Globe, 42d Cong., 1st Sess. (1871):
50, 68, 216 ..... 28, 42
299 26
365 28
429, 568 29

2 Cong. Rec. (1874):
646-650 ..... 30, 33
825-828 ..... 30, 33

124 Cong. Rec. H 1553-H 1570 (daily ed. February 28, 1978) 40

Developments in the Law—Section 1983 and Federalism, 90 Harv. L. Rev. (1977):
1135, 1143 ..... 21, 22
1147-1153 ..... 24, 25

Dwan & Feidler, The Federal Statutes—Their History and Use, 22 Minn. L. Rev. (1938):
1008, 1012-1014 30

PAGE

Gressman, The Unhappy History of Civil Rights Legislation, 50 Mich. L. Rev. (1952):
1323-1324 21
1325 22
1326-1327 24
1331-1333 25
1334 25

H.R. 9622, 95th Cong., 2d Sess. (1977) 40

H.R. Rep. No. 95-893, 95th Cong., 2d Sess. 8, 19 (1978) 40

Laufer, Hague v. C.I.O.: Mr. Justice Stone's Test of Federal Jurisdiction——A Reappraisal, 19 Buffalo L. Rev. (1970):
547, 560 36

Note, 16 Geo. Wash. L. Rev. (1948):
260, 262 32

Note, 52 Harv. L. Rev. (1939):
1136, 1138-1140 32

Ten Broek, Equal Under Law (1965):
178-179 22
201 24
202-203 25
234-237 29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5324

JULIA GONZALEZ, individually and as Guardian Ad Litem for LUIS GONZALEZ, Age 9, and MANUEL GONZALEZ, age 10, and Further On Behalf of All Persons Similarly Situated,

Petitioners,

v.

JAMES F. YOUNG, Director, Hudson County Welfare Board, and G. THOMAS RITI, Director, New Jersey Division of Public Welfare,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT G. THOMAS RITI, DIRECTOR, NEW JERSEY DIVISION OF PUBLIC WELFARE

Questions Presented

1. Does a claim which depends solely upon construction of a federal statute become a right "secured by the Constitution" simply because the Supremacy Clause makes such a statute binding upon the States?

2. Is the federal Social Security Act a statute "providing for equal rights" over which a federal district court may exercise jurisdiction pursuant to 28 USC § 1343(3) and its companion provisions?

3. Is the federal Social Security Act a statute "providing for the protection of civil rights, including the right to vote" over which a federal district court may exercise jurisdiction pursuant to 28 U.S.C. § 1343(4)?

Statutes Involved

42 USC § 1983 CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 USC § 1343 CIVIL RIGHTS AND ELECTIVE FRANCHISE

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Counter-Statement of the Case

Petitioner filed a verified complaint, containing two counts, in the United States District Court for the District of New Jersey on March 11, 1976. Petitioner and her family are recipients of Aid to Families with Dependent Children (AFDC) (42 USC § 601 *et seq.*) (App. 3-4). The first count of the complaint alleged that petitioner applied to Respondent James F. Young, Director of the Hudson County Welfare Board, for an emergency assistance grant of $163.00 pursuant to section 406(e) of the Social Security Act, 42 USC § 606(e) (App. 4). Repondent Young considered petitioner's application but denied emergency assistance in accordance with New Jersey emergency assistance eligibility criteria, N.J.A.C. 10:82-5.12(c)(1) (App. 5). Petitioner alleged that the denial of an emergency grant on the basis of that state regulation violates section 406(e) of the Social Security Act since the federal eligibility statute is much broader than the state regulation (App. 5). The second count of the complaint alleged that Respondent G. Thomas Riti, Director of the New Jersey Division of Public Welfare, failed to implement "meaningful administrative procedures for welfare recipients who are denied emergency assistance" (App. 6). The complaint sought declaratory and injunctive relief, including an award of $163.00 (App. 6-7).

Cross motions for summary judgment were filed by all parties. In a decision filed on August 13, 1976, the district court found that new state regulations providing administrative hearings to rejected emergency assistance claimants rendered count two moot. The court construed count one to state both statutory and constitutional claims pursuant to 42 USC § 1983:

> "The only constitutional claim the plaintiff presents is that the alleged conflict between the state and federal statutes and regulations violates rights secured for her by the Supremacy Clause of the Constitution. The claim that she has been deprived of rights secured by the laws of the United States is essentially the same: that is, that she has a right under the federal statutes and regulations to receive emergency assistance benefits which are being denied her by state and local officials acting under color of state law." *Gonzalez* v. *Young,* 418 F. Supp. 566 at 569 (D. N.J. 1976).

Without passing upon the "substantiality" of petitioner's alleged constitutional claim, the court invoked 28 USC § 1343(3) and (4) to exercise jurisdiction over the statutory claim, declaring that this result was compelled by an earlier decision in the District of New Jersey. *Id.* at 570-571. As to the merits of petitioner's first count, however, the court determined that on the facts presented the State had not restricted emergency assistance eligibility and therefore had not violated § 406(e) of the Social Security Act. *Id.* at 572. Accordingly, on August 30, 1976, the court ordered that judgment be entered for respondents (App. 20).

On July 15, 1977, the United States Court of Appeals for the Third Circuit vacated the district court's judgment

and remanded the cause with directions to dismiss the complaint for want of subject matter jurisdiction. *Gonzalez* v. *Young,* 560 F.2d 160, 169 (3d Cir. 1977). The court found that petitioner's Supremacy Clause claim was of insufficient substance to confer jurisdiction under 28 USC § 1343(3). *Id.* at 165-166. Although it conceded that petitioner's claim could not succeed without ultimate resort to the Supremacy Clause, the court determined that the claim essentially involved the construction of conflicting statutes and thus could not be deemed "constitutional" in nature. *Id.* Moreover, the court determined that petitioner's statutory claim, based upon the Social Security Act, was not cognizable in the district court pursuant to 28 USC § 1343(3) and (4), since by their very terms these provisions are applicable only to federal statutes "providing for equal rights" and "providing for the protection of civil rights," respectively. *Id.* at 166-168. The court held that neither the Social Security Act, nor 42 USC § 1983, fit either of these descriptions. *Id.*

Summary of Argument

In 1871, Congress for the first time established a federal civil remedy to provide relief to individuals whose constitutionl rights were denied by a state or by persons acting under color of state law. The legislative history of the 1871 Act indicates that the federal cause of action and complementary jurisdiction were expressly designed to enforce the newly enunciated substantive equal rights embodied in the Civil Rights Act of 1866 and the Fourteenth Amendment against state inaction or toleration of private lawlessness. Thus, enforcement of the right to contract, own property, inherit, obtain access to courts, and to full and equal benefit of all laws, irrespective of

a person's race or color, was provided in order that each citizen of the United States could enjoy those essential civil rights which are an integral part of such citizenship.

Although the statute which provides for this remedial cause of action, currently 42 USC § 1983, and its jurisdictional analogue, 28 USC § 1343(3), have been revised and codified over the years, the scope of their coverage has never been enlarged by Congress beyond the enforcement of those clearly defined rights secured by the Fourteenth Amendment and its past and future implementing legislation. As the rights protected by the Fourteenth Amendment have been broadened by judicial construction over the years to embrace various fundamental rights specified in the Bill of Rights, so also have § 1983 and § 1343(3) been broadened by implication in order to continue their function as statutes designed to enforce Fourteenth Amendment rights. Congress has never, however, made § 1983 and § 1343(3) applicable to the enforcement of general statutory rights in addition to those grounded in the Fourteenth Amendment and its implementing legislation. Thus, § 1343(3) provides a federal forum only when rights secured by the Constitution or any "Act of Congress providing for equal rights" are at stake.

Petitioner seeks enforcement of an alleged right to public assistance benefits secured not by the Fourteenth Amendment or any equal rights legislation but by the Social Security Act. The Act itself does not provide for access to the federal courts to assert such statutory rights. Congress specifically provided for State enforcement of that Act by requiring that claimants who are denied benefits have the right to an administrative "fair hearing" to seek vindication of Social Security Act claims. Although these rights could also be asserted in the federal

courts under general federal question jurisdiction, 28 USC § 1331(a), petitioner's claim is for less than the $10,000 minimum amount.

Petitioner alleges that resort to § 1983 and § 1343(3) is proper because she is asserting a right secured to her by the Supremacy Clause of the Constitution. It is clear, however, that petitioner's claim will stand or fall only upon the construction, operation or effect given to the source of her claim § 406 (e) of the Social Security Act. The Supremacy Clause, under these circumstances, is not the object of judicial analysis, but is a principle of federalism which automatically requires a federal statute to supercede state law when a congressional intent to preempt an area is found. The mere chance that the Supremacy Clause may be invoked to provide such a result does not transform a statutory right into a right of constitutional dimensions.

Alternatively, petitioner contends that her statutory right under § 406(e) of the Social Security Act is enforceable pursuant to § 1983 and § 1343(3), since § 1983 is available to enforce rights secured by the "Constitution and laws." The phrase "and laws" (§ 1983), however, must be read as complementing the phrase "equal rights" (§ 1343(3)). Since the Social Security Act obviously does not implement the Fourteenth Amendment and does not secure "equal rights," enforcement of the Act is beyond the scope of § 1983 and § 1343(3). A holding to the contrary would clearly offend the legislative intent underlying these remedial provisions, and would attribute to Congress the creation of a remedial cause of action with no corresponding jurisdiction.

Petitioner's resort to 28 USC § 1343(4), which was enacted in 1957 to provide jurisdiction to redress rights secured by laws "providing for the protection of civil

rights, including the right to vote," fares no better for similar reasons. The Social Security Act certainly does not "protect civil rights." Nor does § 1983 itself do so, since it secures no substantive rights at all. Section 1983 is merely the provision which permits a cause of action to be brought in a federal court if rights secured elsewhere (i.e., by the Constitution or equal rights legislation) are violated.

Accordingly, it is submitted that the Third Circuit properly concluded that petitioner's complaint was not cognizable in the federal courts.

ARGUMENT

POINT I

Since a resolution of petitioner's claim involves only the construction of conflicting Federal and State laws, and does not require any inquiry into the construction, operation or effect of the Supremacy Clause, petitioner's claim is not a substantial constitutional claim arising under, or secured by, the Supremacy Clause.

The essence of petitioner's claim is that her right to receive emergency assistance benefits pursuant to section 406(e) of the Social Security Act (42 USC § 606(e)) has been denied to her under color of a New Jersey regulation, N.J.A.C. 10:82-5.12(c)(1). An examination of petitioner's complaint led both the district court and the court of appeals to conclude that "[t]he only constitutional claim the [petitioner] presents is that the alleged conflict between the State and Federal statutes and regulations violates rights secured for her by the Supremacy Clause of the Constitution." *Gonzalez* v. *Young,* 418 F. Supp. 566, 569 (D. N.J. 1976), vacated and remanded, 560 F. 2d 160, 165 (3d Cir. 1977). Based upon this purported denial of constitutional rights secured by the Supremacy Clause, petitioner has set up a cause of action for redress pursuant to 42 USC § 1983 with concomitant federal jurisdiction grounded in 28 USC § 1343(3). Accordingly, this case squarely presents an issue which the Court noted but left unresolved in *Hagans* v. *Lavine,* 415 U.S. 528, 533 n. 5 (1974): whether or not the "secured by the Constitution" language of § 1343(3) should be construed to exclude Supremacy Clause issues.

It has long been established that § 1343(3) confers jurisdiction upon district courts to entertain constitutional claims provided that such claims are of "sufficient substance." *Id.* at 536. Reaffirming that the presence of a substantial federal question "is essential to jurisdiction," the Court in *Hagans* declared that "the federal courts are without power to entertain claims otherwise within their juridiction if they are . . . 'wholly unsubstantial' [or] 'obviously frivolous.'" *Id.* at 537. Aside from the question of substantiality, the *Hagans* Court had no occasion to inquire preliminarily whether the equal protection claim asserted in that case was indeed a federal constitutional question otherwise within its jurisdiction, since the equal protection clause is obviously a recognized source for such claims. Implicit in *Hagans,* however, is the long standing principle that in determining jurisdiction, a federal court must first satisfy itself that an actual constitutional claim or question has been presented. Once satisfied, the court should proceed to the second step in its analysis, an examination of whether the constitutional claim previously identified is indeed substantial enough to warrant the exercise of federal jurisdiction.

The time honored test for determining the existence of a judicially cognizable constitutional claim or question is that the right or immunity claimed by plaintiff must be such that it will be supported if the Constitution is given one construction or effect, and defeated if another construction or effect is given. *Bell* v. *Hood,* 327 U.S. 678, 685 (1946); *Gully* v. *First Nat. Bank,* 299 U.S. 109 (1936); *Little York Gold Washing and Water Co.* v. *Keyes,* 96 U.S. 199 (1878); *Osborn* v. *Bank of U.S.,* 9 Wheat. 738 (1824). A case is truly said to be constitutionally-based, or arise under the Constitution, whenever a correct decision depends upon the construction of a part of the Constitution. See *Cohens* v. *Virginia,* 6 Wheat. 379 (1821). Thus, a case is based upon the Constitution to the extent that there is a dispute as to the meaning and effect of one or more of its provisions. The suit must arise, at least in part, out of a controversy between the parties respecting the construction or operation of the Constitution upon the specific facts involved. Mere incidental involvement or construction of the Constitution is insufficient to present a judicially cognizable constitutional question. See *Newburyport Water Co.* v. *Newburyport,* 193 U.S. 561 (1904); *New Orleans* v. *Benjamin,* 153 U.S. 411 (1894). And, of course, as reiterated in *Hagans,* once a constitutional claim is in fact stated, the Court must assure itself that the claim is "substantial" prior to exercising jurisdiction over it.

The Supremacy Clause, *US Const.* Art. VI, cl. 2, provides that:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

It is clear that claims, such as petitioner's, which are based solely on this provision can never meet the above-stated tests respecting the existence of a Federal constitutional claim. As Mr. Justice Harlan stated for the Court in *Swift & Co.* v. *Wickham,* 382 U.S. 111 (1965):

> "Any such pre-emption or conflict claim is of course grounded in the Supremacy Clause of the Constitution: if a State measure conflicts with a federal requirement, the State provision must give way. *Gibbons* v. *Ogden,* 9 Wheat. 1. The *basic question involved in these cases, however, is never one of interpretation of the Federal Constitution but inevitably one of comparing two statutes.*" 382 U.S. at 120 (emphasis added).

Petitioner's claim that she is entitled to emergency assistance will not be supported or defeated depending upon what construction the Supremacy Clause is given by the Court. Indeed, there is no dispute at all as to the meaning or effect of the Supremacy Clause in this case; it is conceded that if Congress intended to pre-empt the area of emergency assistance eligibility by virtue of § 406(e) of the Social Security Act, and if a State regulation unduly restricts those eligibility criteria, the Supremacy Clause will be invoked to strike down the conflicting State regulation. The application of the Supremacy Clause to such a situation, however, is automatic and undisputed. No question of the construction or effect of that provision is presented. For this reason, petitioner's rights will be vindicated, if at all, by determining the meaning and effect of federal and state statutes or regulations, and only then by an automatic application of the Supremacy Clause principle, if appropriate. Since, however, it is not the construction, operation or effect of the Supremacy Clause itself which is at issue here, petitioner obviously

has not stated a substantial Constitutional claim consistent with the rule of *Bell* v. *Hood, supra,* and *Hagans* v. *Lavine, supra.**

The extent of petitioner's primary dependence upon statutory, rather than Constitutional, provisions is underscored by an examination of the source of her purported right, section 406(e) of the Social Security Act, 42 USC § 606(e). In *Quern* v. *Mandley,* No. 76-1159 (U.S., *cert.* granted June 6, 1977), and *Califano* v. *Mandley,* No. 76-1416 (U.S., *cert.* granted June 6, 1977) among the issues before the Court is whether § 406(e) specifies emergency assistance eligibility criteria which Congress intended to be binding upon the States, or whether that statute merely delineates the outer parameters within which federal funds will be made available to the State for distribution by them in accordance with programs tailored to individual State needs. Plainly, a holding in those cases embracing the latter alternative would completely undercut petitioner's claim that § 406(e) secures her right to emergency assistance, notwithstanding the existence or operation of the Supremacy Clause. Surely this illustrates the non-constitutional nature of petitioner's claim.

---

* Respondent does not contend that a substantial constitutional question can never arise under the Supremacy Clause, for clearly such a question does arise when the construction, operation or effect of the Supremacy Clause is at issue. For example, if an agreement or an interstate compact, ratified by Congress, is found to conflict with a state statute, a question arising under the Supremacy Clause may be presented to the extent that it is necessary to decide whether the agreement or compact is indeed a federal "law" which is supreme. In such a case, it would be necessary to actually construe the Supremacy Clause per se to arrive at the result. Cf. *Antoine* v. *Washington,* 420 U.S. 194 (1975). By contrast, in the case *sub judice,* it is not the Supremacy Clause which is being construed, but the federal and state laws which purportedly conflict.

The issue in *Swift & Co.* v. *Wickham, supra,* was whether a claim of conflict between State and Federal statutes presented a "constitutional" issue requiring the convocation of a three-judge district court pursuant to the former 28 USC § 2281. Although the decision itself was based on the policy behind § 2281, it nevertheless provides valuable insight into the nature of the Supremacy Clause. The Court hypothesized that for the sake of simplicity and workability, it could easily construe § 2281 to apply to all suits to enjoin State statutes conflicting with federal enactments. This alternative was attractive, said Mr. Justice Harlan, for "to be sure, any determination that a State statute is void for obstructing a federal statute does rest on the Supremacy Clause of the Federal Constitution." 382 U.S. at 125.

The Court rejected this approach, however, based upon the specific language of § 2281 which it found to evince "a congressional purpose to confine the three-judge court requirement to injunction suits depending directly upon a *substantive provision of the Constitution,*" as opposed to the merely automatic application of principles contained in the Supremacy Clause. *Id.* at 127. In so doing, the Court significantly enunciated what is perhaps the best test as to whether an issue is of "constitutional" or merely "statutory" proportions by remarking that:

> "[T]hose who enacted the three-judge court statute should not be deemed to have been insensitive to the circumstance that single-judge decisions in conflict and pre-emption cases were always subject to the corrective power of Congress, whereas a 'constitutional' decision by such a judge would be beyond that ready means of correction and could be dealt with only by constitutional amendment." *Id.*

Petitioner's rights in this matter are of course subject to the "corrective power of Congress" which, after all, has created and altered emergency assistance and other such rights through its enactment of the Social Security Act as amended. No matter of constitutional proportions is thus implicated.

In rejecting petitioner's contention that she was relying upon a right "secured by" the Supremacy Clause, the Third Circuit, adopting a like decision by the Second Circuit in *Andrews* v. *Maher,* 525 F.2d 113, 118-119 (2d Cir. 1975), stated in language that bears repeating that:

> "The Supremacy Clause does not secure rights to individuals; it states a fundamental structural principle of federalism. While that clause is the reason why a State law that conflicts with a federal statute is invalid, it is the federal statute that confers whatever rights that the individual is seeking to vindicate." *Gonzalez* v. *Young, supra,* 560 F. 2d at 166.

When considered against an analogous "fundamental principle of federalism," the Full Faith and Credit Clause, it is certainly not surprising that the Supremacy Clause does not secure federal constitutional rights and is therefore unable to serve as the basis for a jurisdictionally cognizable constitutional claim. The Full Faith and Credit Clause, *U.S. Const.,* Art. IV, § 1, provides:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."

Whereas the Supremacy Clause governs the outcome of conflicts between federal and state enactments, the Full Faith and Credit Clause concerns conflicts between laws

of the individual states. Despite the directory ("shall be given") nature of the Full Faith and Credit command, however, it has long been held that this clause secures no rights and may not be the source of a federal constitutional claim.

For example, in *Chicago & Alton R. Co.* v. *Wiggins Ferry Co.,* 108 U.S. 18 (1883), it was alleged that an Illinois statute prohibited the making of a certain contract, but that a Missouri court had refused to adhere to the Illinois act. For that reason, federal jurisdiction was asserted on the basis of Article IV, § 1. The Court decided, however, that the real issue in the case was not the degree of faith and credit which must be given to the public acts of Illinois in Missouri, but what the Illinois law actually meant. The case involved the construction of only state laws and not the federal constitution. Indeed, the Court remarked that if jurisdiction were found under the circumstances of this case, a federal constitutional issue would be presented whenever public acts of one state were to be construed in an action pending in a court of another State.

In *Minnesota* v. *Northern Securities,* 194 U.S. 48 (1904), it was charged that the defendant created and used a New Jersey corporation to affect Minnesota property rights in violation of Minnesota law. Federal jurisdiction was pleaded on the basis that Article IV must be construed to make Minnesota law effective throughout the United States insofar as it affects property rights in that state, for otherwise the policy and laws of any state could be easily evaded. 194 U.S. at 72. The Court, however, employing reasoning similar to that of the Third Circuit in the instant matter, held that no cognizable federal constitutional claim had been presented by these facts:

> "We do not think that the [Full Faith and Credit Clause of the Constitution] has any bearing what-

> ever upon the question under consideration. It only prescribes a rule by which courts, Federal and State, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records, and judicial proceedings of a state other than that in which the court is sitting." *Id.*

As a result, it is firmly established that the Full Faith and Credit Clause, taken alone, does not provide the basis for the exercise of federal jurisdiction. *California ex rel. McColgan* v. *Bruce,* 129 F. 2d 421 (9th Cir. 1942), *cert.* denied 317 U.S. 678 (1942); *Hazen Research, Inc.* v. *Omega Minerals, Inc.,* 497 F. 2d 151, 153 n. 1 (5th Cir. 1974); *Carqueville* v. *Woodruff,* 153 F. 2d 1011 (6th Cir. 1946); *Luterman* v. *Levin,* 318 F. Supp. 11 (D. Md. 1971).

It is thus apparent that only after various state or federal statutory rights are definitively construed do the principles embodied in the Supremacy or Full Faith and Credit clauses come into play. These principles of federalism are not themselves the subject of substantive analysis, but are automatically applied once federal and/or state statutory rights are defined.

This conclusion is buttressed by the judicial construction given over the years to the "secured by the Constitution" clause of § 1343(3). In *Carter* v. *Greenhow,* 114 U.S. 317 (1884), the earliest case discussing this phrase, the Court found that to be "secured" by the Constitution a right must be "directly conferred" by one of its provisions. The Court held that the right to non-impairment of a contract was not such a "directly conferred" right, but declined to elaborate further as to what rights were within the contemplation of that phrase. In *Holdt* v. *Indiana Manuf. Co.,* 176 U.S. 68 (1900), the Court held

that the purported right to hold a patent free of State taxation is not "secured by the Constitution," and described that phrase as being applicable only to "civil rights" which remained undefined.

In *Hague* v. *C.I.O.,* 307 U.S. 496 (1938), Mr. Justice Stone addressed the scope of this phrase in his well-known concurring opinion, and determined that "secured" rights included those "created" as well as "protected" by the Constitution. 307 U.S. at 526. Mr. Justice Brennan, concurring in part and dissenting in part in *United States* v. *Guest,* 383 U.S. 745 (1966), expressed the view that "secured" means "created by, arising under or dependent upon" a provision of the Constitution, citing *Logan* v. *United States,* 144 U.S. 263, 293 (1892). 383 U.S. at 779. Thus, a right is "secured by the Constitution" if it "emanates from" or "finds its source in" the Constitution. *Id.* The majority of the Court in *United States* v. *Guest,* however, determined that only rights "fully protected" by the Constitution are "secured" by it.

It is submitted that regardless of which of these formulations is adopted, a claim grounded in the Supremacy Clause fails to meet the test. The right asserted by petitioner neither arises under nor is created or protected by that clause: § 406(e) of the Social Security Act performs all of those functions, if indeed they are performed at all. Petitioner's claim is secondarily "dependent upon" the Supremacy Clause, it is true, but only insofar as that clause operates to declare the final result once a preliminary determination has been made that petitioner does indeed possess a right which is "dependent upon" a federal statute. Under any of these definitions of "secured," the Supremacy Clause therefore fails to secure rights.

This result comports with the purposes of § 1343(3), which was designed to permit those whose civil rights

have been violated to seek relief from the federal courts without having to satisfy an amount in controversy prerequisite. See, e.g., 28 USC §§ 1331, 1332. In practically every instance in which a state statute or regulation conflicts with a federal statute, action under color of state law will be involved. Thus, were the Court to hold that Supremacy Clause claims concern rights "secured by" or arising under the Constitution, the result would be that every such claim would be assertable in federal court, pursuant to §§ 1343(3). The district courts would then be faced with all manner of federal-state statutory conflicts involving everything from frozen turkeys (*Swift & Co.* v. *Wickham, supra*) to avocados (*Florida Lime & Avocado Growers, Inc.* v. *Jacobsen,* 362 U.S. 73 (1960)) under the guise of civil rights jurisdiction irrespective of the amount in controversy.* Moreover, the courts would be inundated with particularized statutory claims under such programs of cooperative federalism as Aid to Families with Dependent Children (42 USC § 601 *et seq.*), Supplemental Security Income (42 USC § 1381 *et seq.*), Medicaid (42 USC § 1396 *et seq.*), and Social Services (42 USC § 1397 *et seq.*), even though Congress has never expressly authorized jurisdiction over such cases.

In sum, it is submitted that petitioner has failed to allege that she has been deprived of any right secured to her by the Constitution, since the right she asserts is

* It is true that if such claims involve more than $10,000, jurisdiction is proper pursuant to 28 USC § 1331. However, this is so not because the Supremacy Clause *per se* presents a claim which "arises under" the Constitution for purposes of § 1331, but because such claims inevitably arise under the "laws" of the United States to the extent that, as here, they are based on federal statutes. See *Hagans* v. *Lavine,* 415 U.S at 553 (Rehnquist, J., dissenting.).

secured, if at all, by the Social Security Act, and not the Supremacy Clause. Accordingly, the court of appeals properly held that the district court lacked jurisdiction over the purported "constitutional" claim.

POINT II

Since the Social Security Act does not "provide for equal rights," petitioner is precluded from utilizing the remedial provisions of the Civil Rights Act of 1871 to compel the payment of Social Security Act benefits.

Petitioner claims that she is entitled to receive monetary benefits under the emergency assistance program of the Social Security Act, but that these benefits were denied her under color of State law. The sole source of the right to the benefits claimed is section 406(e) of the Social Security Act, 42 USC § 606(e).* Yet, petitioner proceeded to file an action in the district court**

* Whether or not §406(e) secures any right to individuals such as petitioner is an issue currently before the Court in *Quern* v. *Mandley,* No. 76-1159 (U.S., *cert.* granted June 6, 1977) and *Califano* v. *Mandley,* No. 76-1416 (U.S., *cert.* granted June 6, 1977). Respondent submits that §406(e) does not specify emergency assistance benefits eligibility criteria which the States are obligated to follow. Rather, it is respondent's position that §406(e) merely delineates the conditions under which federal funds will be made available to States which wish to operate programs in accordance with local needs. See *Amicus Curiae Brief of the State of New Jersey, Quern* v. *Mandley,* No. 76-1159 and *Califano* v. *Mandley,* No. 76-1416.

** Both the district court and the court of appeals held that jurisdiction over petitioner's claim could not be based on the general federal question jurisdiction statute, 28 USC §1331, for failure to satisfy the $10,000 amount in controversy prerequisite. *Gonzalez* v. *Young, supra,* 418 F. Supp. at 569-570; 560 F. 2d at 164. That determination is not challenged by petitioner.

under the remedial provisions of the Civil Rights Act of 1871, 42 USC § 1983 and 28 USC § 1343(3). Section 1983, however, provides a cause of action to redress the deprivation of rights "secured by the Constitution and laws," while § 1343(3) applies to rights "secured by the Constitution of the United States or by any Act of Congress providing for equal rights. . . ."

Thus, the issue presented to the Court concerns the scope of the rights for which Congress intended the Civil Rights Act of 1871 to afford a remedy. More specifically, the Court once again has before it the issue which it found unnecessary to address in the factual context of *Hagans* v. *Lavine*, 415 U.S. 528, 533 n. 5 (1974), namely, whether rights flowing from the Social Security Act are equal rights of the type that the 1871 Act was designed to redress. Respondent submits that the Third Circuit properly decided this issue by answering in the negative.*

In considering whether Social Security Act rights fall within the remedial scope of §1983 and §1343(3), the value of consulting the legislative history of these provisions cannot be understated. When interpreting these statutes, the Court has often analyzed their legislative history to ascertain the circumstances under which the statutory language was employed in order to shed light upon the Congressional purpose in enacting them. *Examining Board* v. *Flores de Otero*, 426 U.S. 572, 580 (1976); *District of Columbia* v. *Carter*, 409 U.S. 418, 420 (1973).

---

* It is conceded that had petitioner pleaded a substantial constitutional question, the district court could exercise pendent jurisdiction over petitioner's purely statutory claim, irrespective of the amount in controversy, under the doctrine of *Hagans* v. *Lavine*, 415 U.S. 528 (1974). Point I, *supra*, demonstrates, and the court of appeals found, however, that petitioner is precluded from travelling this route because she failed to set forth a substantial constitutional claim.

The Court has expressed its determination that these provisions "be given the meaning and sweep that their origins and their language dictate." *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 549 (1972). Indeed, the Court has consistently recognized that since statutory words generally have different shades of meaning, an attempt should be made to construe them "if reasonably possible to effectuate the intent of the lawmakers." *District of Columbia* v. *Carter, supra*, 409 U.S. at 420. Because of the novelty of the issues raised by petitioner, it is appropriate to look to the legislative history for guidance as to the type of equal rights which Reconstruction-era legislation was enacted to secure.

The Thirteenth Amendment to the Constitution provides an appropriate analytical starting point. Ratified in 1865, that amendment abolished slavery and involuntary servitude throughout the nation and gave Congress the power to make its provisions effective by appropriate legislation. Significantly, the amendment was directed not only to the federal government, but to the States as well as private individuals. See *Developments in the Law—Section 1983 and Federalism*, 90 Harv. L. Rev. 1135, 1143 (1977) (hereinafter cited as *"Developments"*); Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich. L. Rev. 1323, 1324 (1952) (hereinafter cited as "Gressman"); *District of Columbia* v. *Carter, supra*, 409 U.S. at 421-422. Congress assumed that the amendment would have far-reaching effects beyond the abolition of personal bondage and would serve as the basis for guaranteeing certain minimum rights to freedmen. Indeed, the opponents of the amendment attacked it as an undue extension of the power of the federal government for precisely these reasons. Widespread atrocities against the newly freed blacks and their white sympathizers, as well as the enactment in southern states of the notorious "Black Codes," soon made it ap-

parent that the idealistic words of the amendment alone would be ineffective in implementing the amendment's overall goals. *Developments* at 1143; Gressman at 1324-1325.

Congress responded by enacting the Civil Rights Act of April 9, 1866, c. 31, 14 Stat. 27, in order to effectuate the intentions of the amendment by guaranteeing "broad and sweeping protection to basic civil rights." *Lynch* v. *Household Finance Corp., supra,* 405 U.S. at 543-544. See generally J. Ten Broek, *Equal Under Law* 178-179 (1965) (hereinafter cited as "Ten Broek"). Section 1 of the Civil Rights Act of 1866 identified a new class of "citizens of the United States" and listed the rights and obligations of such citizens in sweeping terms:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishments, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

Insofar, as United States citizens engaged in the activities specified in § 1, the Act provided an "absolute bar" to

all discrimination, public as well as private, federal as well as state. *District of Columbia* v. *Carter, supra,* 409 U.S. at 422; Cf. *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409, 413, 437 (1968).

Section 2 of the 1866 Act, providing criminal penalties for the deprivation of "any right secured or protected" by § 1, was not so broad however. Although "§ 1 was meant to prohibit *all* racially motivated deprivations of the rights enumerated in the statute, . . . only those deprivations perpetrated 'under color of law' were to be criminally punishable under § 2." *Jones* v. *Alfred H. Mayer Co., supra,* 392 U.S. at 426. Section 2 of the Act provided as follows:

> "That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court."

Section 3 of the 1866 Act granted jurisdiction "of all crimes and offenses" committed pursuant to § 2 to "the district courts of the United States . . . exclusively of the courts of the several states." That section also granted concurrent jurisdiction to the district and circuit courts:

> "of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act."

Section 3 thus vested the federal courts with original as well as removal jurisdiction of actions to enforce any right secured by § 1. *Georgia* v. *Rachel,* 384 U.S. 780, 789 (1966); *Greenwood* v. *Peacock,* 384 U.S. 808 (1966); *Developments* at 1148; P. Bator, P. Mishkin, D. Shapiro and H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 846 (2nd ed. 1973); *Mahone* v. *Waddle,* 564 F. 2d 1018 (3rd Cir. 1977), petition for *cert.* filed No. 77-731 (U.S. November 23, 1977). This section marked the beginning of an expanded role for the federal courts in protecting the newly enunciated federal rights of United States citizens. *Developments* at 1147-1153.

The Civil Rights Act of 1866 "culminated the abolitionist concept of the federal government as the protector of the essential principles of liberty." Gressman at 1326. However, opponents of the Act, the very persons who had opposed adoption of the Thirteenth Amendment on the grounds that it too broadly incorporated abolitionist doctrines, subsequently began to argue for strict construction of the amendment. This conveniently revised view held that the amendment was merely designed to terminate the master-slave relationship and nothing more. *Id.* at 1327; Ten Broek at 201. Indeed, it was contended that § 2 of the amendment restricted rather than enlarged its scope, and that therefore the Civil Rights Act itself was unauthorized. *Id.* As a result, in order to ensure that the rights secured by the 1866 Act would be truly nationalized and placed beyond the power of shifting congressional majorities, the Thirty-Ninth Congress decided to make

them part of the Constitution itself by enactment of the Fourteenth Amendment. Gressman at 1329-1331; Ten Broek at 202-203. It is therefore beyond dispute that § 1 of the Fourteenth Amendment was based upon the 1866 Act, thus placing the Act beyond constitutional reproach and vindicating for all persons the rights established therein. Gressman at 1331-1333; *Lynch* v. *Household Finance Corp., supra,* 405 U.S. at 544; *Hague* v. *C.I.O., supra,* 307 U.S. at 509-510.

Following the ratification of the Fourteenth Amendment in 1868, Congress began to enforce it "by appropriate legislation" pursuant to § 2 of the amendment. The Enforcement Act of May 31, 1870, c. 114, 16 Stat. 140, reenacted the substantive and penalty provisions of the 1866 Act, thereby resolving any doubt as to the constitutional validity of the earlier Act in the wake of the Fourteenth Amendment. See Enforcement Act of May 31, 1870, c. 114, §§ 16-18, 16 Stat. 140; *Jones* v. *Alfred H. Mayer Co., supra,* 392 U.S. at 436; Gressman at 1333-1334. The re-enactment of the 1866 Act thus had the dual purpose of reaffirming the vitality of these rights against State action under the Fourteenth Amendment, and against purely private action under the Thirteenth Amendment and the original 1866 Act. *Id.*

Despite this flurry of legislation, however, Southern resistance to Congress' Reconstruction policies escalated and by early 1871 "there was overwhelming evidence that through tacit complicity and deliberate inactivity, state and local officials were fostering vigilante terrorism against politically active blacks and Union sympathizers." *Developments* at 1153. Atrocities committed by the Klu Klux Klan led Congress to provide civil rights protection "against official inaction and the toleration of private lawlessness." *Id.* President Grant's special message to Congress of March 23, 1871, requested emergency legislation and highlighted the problem:

"A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of State authorities I do not doubt: that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States. It may be expedient to provide that such law as shall be passed in pursuance of this recommendation shall expire at the end of the next session of Congress. There is no other subject upon which I would recommend legislation during the present session." Cong. Globe, 42d Cong., 1st Sess. 299 (1871).

In response, Congress enacted a bill whose "purpose is plain from the title of the legislation, 'An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.'" *Monroe* v. *Pape,* 365 U.S. 167, 171 (1961); Act of April 20, 1871, c. 22, 17 Stat. 13. Section 1 of the 1871 Act is the acknowledged statutory ancestor of *both* 42 USC § 1983 and 28 USC § 1343(3), and in its original version provided *only* for the enforcement of *constitutional* rights in these terms:

"[A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage of any

State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases."

The Court has correctly noted that "the broad concept of civil rights embodied in the 1866 Act and in the Fourteenth Amendment is unmistakably evident in the legislative history of § 1 of the Civil Rights Act of 1871." *Lynch* v. *Household Finance Corp., supra,* 405 U.S. at 545. Indeed, the legislative history indicates that § 1 of the 1871 Act was designed precisely to enforce, in a federal civil action, the substantive rights enunciated in the 1866 Act which were subsequently elevated beyond the reach of future congressional or state tampering by the Fourteenth Amendment. Representative Shellabarger of Ohio, the floor manager of the bill in the House, stated that:

"The model for [§ 1 of the 1871 Act] will be found in the second section of the Act of April 9, 1866,

known as the 'Civil Rights Act.' *That section provides a criminal proceeding in identically the same case as this one provides a civil remedy for,* except that the deprivation under color of State law must, under the Civil Rights Act, have been on account of race, color or former slavery. *This section* of the bill, on the same state of facts, not only *provides a civil remedy* for persons whose former condition may have been that of slaves, but also to all people *where, under color of State law, they* or any of them *may be deprived of rights to which they are entitled under the Constitution* by reason and virtue of their national citizenship." Cong. Globe, 42d Cong., 1st Sess., app. 68 (1871) (emphasis added).

It is at once clear that the "constitutional" rights, as contemplated by § 1 of the 1871 Act, were the very rights which Congress took pains to specify in § 1 of the 1866 Act for the purpose of affording equality to the newly emancipated blacks. To the extent, however, that the 1871 Act is limited to enforcing rights violated "under color of State law," it is narrower than § 1 of the 1866 Act. But to the extent that it affords relief to all people, and not just former slaves, it is consistent with Congress' original understanding of the Thirteenth Amendment respecting equality which was subsequently made manifest in the Fourteenth Amendment. This theme was re-affirmed by Representative Arthur of Kentucky, an opponent of the 1866 and 1871 Acts, who described the reach of § 1 of the 1871 Act as "cumulative, as far as it goes, with certain provisions in the [1866] civil rights bill." Cong. Globe, 42d Cong., 1st Sess., 365 (1871).

Likewise, Senator Edmunds recognized the substantive interplay between the Fourteenth Amendment and the 1866 Act:

"The first section [of the 1871 Act] is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any State law, and *it is merely carrying out the principles of the civil rights bill* [*of 1866*] *which have since become a part of the Constitution.*" Cong. Globe, 42d Cong., 1st Sess., 568 (1871) (emphasis added).

Representative McHenry declared that § 1 of the 1871 Act "is intended as an amendment to the Civil Rights Act [of 1866]" which "gives a civil remedy for the deprivation of rights, privileges and immunities secured by the Constitution. . . ." Cong. Globe, 42d Cong., 1st Sess., 429 (1871).

The common thread running through this history is that Congress intended to secure to all citizens of the nation, black and white, the "full and equal benefit of all laws," at the same time subjecting everyone to equal "punishment, pain, and penalties, and to none other." 14 Stat. 27; 16 Stat. 140. Congress viewed "equality" as a substantive right, which included the equal right to contract, obtain access to the legal process, inherit, and own or lease real and personal property. *Id.* See Ten Broek at 234-237. Clearly, these were the rights that the 1871 Act was designed to enforce against abridgement under color of state law. Thus, when § 1 of the 1871 Act refers to rights "secured by the Constitution," it clearly applies to the rights set forth in the 1866 Act which were subsequently constitutionalized, at least against state deprivation, in the Fourteenth Amendment, and later restated in the 1870 Act in the form of implementing legislation. This is true regardless of whether the rights are characterized as "statutory" (based on the 1866 or 1870 Acts)

or "constitutional" (based on the Fourteenth Amendment) in nature, since these terms were used interchangeably. The point is that the 1871 Act was uniformly understood to provide a civil remedy to enforce the equal rights of national citizens as specified in the Fourteenth Amendment and its implementing legislation.

It is therefore not surprising that when in 1874 all federal statutes were revised and codified, language was added to the successors of § 1 of the 1871 Act to clarify this understanding. As the Court has noted, jurisdiction over § 1 claims was not independently defined in the 1871 Act, but "was given simply to enforce the substantive rights created by the statute. The two aspects, seemingly, were deemed to coincide." *Examining Board* v. *Flores de Otero, supra,* 426 U.S. at 582. As a result of the statutory revision* of 1874, however, § 1 was divided into cause of action and jurisdiction sections which are the direct predecessors of 42 USC § 1983 and 28 USC § 1343 (3) as we know them today. Rev. Stat. § 1979 afforded a cause of action whenever rights "secured by the *Constitution and laws*" had been violated, the words "and laws" having been added to § 1 of the 1871 Act. Jurisdiction of such actions in the circuit courts was provided by Rev. Stat. § 629(16), which referred to rights "secured

*See Revision of Statutes Act of 1866, c. 140, 14 Stat. 75 (1866); Revision of Statutes Act of 1874, c. 333, § 2, 18 Stat. 113 (1875). The purpose of the revision was to bring "together all statutes and parts of statutes which from similarity of subject ought to be brought together," in the process supplying omissions and altering the imperfections of the original text. *Id.* The revision was viewed as a codification of existing law, and not an expansion or contraction of substantive law. See 2 Cong. Rec. 825-828 (1874) (remarks of Rep. Lawrence); 2 Cong Rec. 646-650 (1874) (remarks of Rep. Poland); see generally Dwan & Feidler, *The Federal Statutes—Their History and Use,* 22 Minn. L. Rev. 1008, 1012-1014 (1938).

by the Constitution of the United States *or . . . by any laws providing for the equal rights of citizens . . . or* of all persons within the jurisdiction of the United States." District court jurisdiction was contained in Rev. Stat. § 563 (12), which pertained to rights "secured by the Constitution . . . *or of any rights secured by any law* of the United States." The latter section, however, was repealed in 1911 when Congress abolished the original jurisdiction of circuit courts and chose the language of Rev. Stat. § 629(16), which substantially survives as 28 USC § 1343 (3), to define the scope of district court jurisdiction. See Act of March 3, 1911, 36 Stat. 1087.

To be sure, the addition of "and laws" to Rev. Stat. § 1979 has been characterized by the Court in *dicta* as an enlargement of the coverage originally afforded by the 1871 Act. See, *e.g. Mitchum* v. *Foster,* 407 U.S. 225, 239 n.30 (1972); *Lynch* v. *Household Finance Corp., supra,* 405 U.S. at 543 n.7; *Hague* v. *C.I.O., supra,* 307 U.S. at 526. The Court made clear in *Hagans* v. *Lavine, supra,* 415 U.S. at 533 n.5, however, that it has yet to definitively construe the phrase. Respondent submits that, upon examination, it appears that neither Congress nor the revisers of the statutes ever intended to enlarge the original reach of § 1 of the 1871 Act by means of Rev. Stat. § 1979 or 42 USC § 1983. Indeed, § 1983 today still provides for redress, against state action, of constitutionally-based equal rights, as those rights have accumulated judicial meaning. The initial scope of § 1 of the 1871 Act has, in effect, been preserved. The 1874 revision was intended only to facilitate the integration of bits and pieces of comprehensive and cohesive legislation into a codified compendium.

For example, where § 1 of the 1871 Act referred *only* to "rights . . . secured by the Constitution," it was commonly understood that statutory rights secured by the

1866 and 1870 Acts were also included within this phrase. Thus, § 1979's reference to "Constitution *and laws*" means precisely what was intended in 1871: rights secured against state action by the Fourteenth Amendment, as implemented by the 1866 and 1870 Acts. It is significant that the term "*and* laws" was chosen by the revisers, since the "secured" rights which were the 1871 Act's object were generally viewed as having a basis in *both* the Constitution *and* the laws passed by Congress.

By contrast, had § 1979 been made applicable to rights secured by the "Constitution *or* laws," the argument that coverage was enlarged by revision would indeed have merit. This distinction, often not fully appreciated,* becomes particularly apparent when § 1979 is compared to the federal question jurisdiction statute, Act of March 3, 1875, § 1, 18 Stat. 470, now codified as 28 USC § 1331(a), which was passed almost contemporaneously. The latter, of course, provides for jurisdiction whenever an action "arises under the Constitution, laws, *or* treaties of the United States." A federal question is thus cognizable under § 1331(a) when it arises under either a statute, or a provision of the Constitution, while a § 1979 (i.e. § 1983) action must be based directly on the Fourteenth Amendment or on the Fourteenth Amendment in conjunction with an Act of Congress specifically implementing its guarantee of equality in the enjoyment of life, liberty or property. This thesis is adequately supported by the "equal rights" term of Rev. Stat. § 629(16), and the conscious choice of this language by Congress in 1911, albeit without explanation, as the sole provision for district court jurisdiction over civil rights actions. See Note, 52 Harv. L. Rev. 1136, 1138-1140 (1939); Note, 16 Geo. Wash. L. Rev. 260, 262 (1948).

---

* See *Paul* v. *Davis*, 424 US 693, 696 n. 1 (1976).

Just prior to the adoption of the Revised Statutes by Congress, Representative Poland, the Chairman of the Committee on Revision, reported that great efforts had been made to avoid modification of existing law which would amount to "new legislation," since such action was beyond the scope of the act authorizing the revision. 2 Cong. Rec. 646-650 (1874) (remarks of Rep. Poland). Specifically addressing the compiler's re-structuring of the various civil rights acts, Rep. Lawrence stated that the revised sections "possibly may show verbal modifications bordering on legislation." 2 Cong. Rec. 827 (1874) (remarks of Rep. Lawrence). Clearly it was not the compiler's intent to effect substantive changes in Rev. Stat. § 1979, however, since that section was designed "to confer a right of civil action" for violations of the 1866 and 1870 Acts "so far as they relate to a declaration of *existing rights.*" *Id.* at 828. Moreover, such an intention would have violated the reviser's "relatively narrow mandate." *Georgia* v. *Rachel, supra,* 384 U.S. at 791.

The Court's decision in *Examining Board* v. *Flores de Otero,* 426 U.S. 572 (1976) provides guidance as to how Rev. Stat. § 1979, and thus the current § 1983, should be interpreted. The problem in *Flores* was that as a result of the statutory revision, § 1979 applied on its face to actions under color of law of any State "or Territory," whereas the jurisdictional provisions, including the present § 1343(3), lacked the "or Territory" phrase. The Court found that despite this discrepancy, no Congressional intention to restrict federal jurisdiction could be discerned. 426 U.S. at 583. The "common origin" of both § 1979 (i.e. § 1983) and § 1343(3) in § 1 of the 1871 Act "suggests that the two provisions were meant to be, and are, complementary." *Id.* It was therefore determined that jurisdiction over claims of the deprivation of rights under color of territorial law was proper, notwithstanding the

lack of an explicit grant, because otherwise a cause of action would have been created for which no jurisdiction had been provided. (Federal question jurisdiction was unavailable to redress such rights until 1875). *Id.* at 585. Moreover, the Court reasoned that had § 1 of the 1871 Act remained wholly intact, and the "or Territory" phrase thus added, jurisdiction would be undisputed. *Id.* n. 15.

In the instant case, however, the Social Security Act became law long after the enactment of federal question jurisdiction. But more importantly, if § 1983 and § 1343(3) are read as an "intact" statute as was their 1871 predecessor, it would be clear that the term "and laws" of § 1983 is the complementary equivalent of "law(s) providing for equal rights." As in *Flores,* when the statutes are harmonized, the more specific phrase should be construed to give meaning to the less specific. Moreover, petitioner's Social Security Act claim does not even state a cause of action pursuant to § 1983: no right "secured by the Constitution *and* laws" is presented in petitioner's complaint simply because the Social Security Act was not designed to implement the Fourteenth Amendment.* Petitioner's case thus does not raise the specter, presented in *Flores,* of a cause of action lacking complementary jurisdiction, since petitioner's claim fails under *both* § 1983 and § 1343(3).

Also instructive is *Georgia* v. *Rachel, supra,* a case in which the Court compared the pre-revision removal jurisdiction of § 3 of the 1866 Act to the post-revision statute currently codified as 28 USC § 1443(1). The latter permits a state court defendant to remove the action to federal court when the right he asserts is a "right under any law providing for equal civil rights." 384 U.S. at 788. This phrase first appeared in the Revised Statutes of 1874; formerly, § 3 of the 1866 Act provided for removal by persons asserting "the rights secured to them by the first section of this act [of 1866]." *Id.* at 788-789. The reason for the substituted language is rather obvious:

> "When the Revised Statutes were compiled, the substantive and removal provisions of the Civil Rights Act of 1866 were carried forward in separate sections. Hence, Congress could no longer identify the rights for which removal was available by using the language of the original Civil Rights Act—'rights secured to them by the first section of this act.'" *Id.* at 789.*

The Court had little difficulty deciding, however, that the altered language lacked any significance and was not intended to expand the scope of removal jurisdiction:

> "There is no substantial indication . . . that the general language of [42 USC § 1443(1) as revised] was intended to expand the kinds of 'law' to which the removal action referred. In spite of the phrase 'any law providing for . . . equal civil rights,' it seems clear that in enacting [§ 1443 (1)], Congress intended in that phrase only to include laws *comparable in nature* to the Civil Rights Act of 1866." *Id.* at 790 (emphasis added).

---

* Indeed, the Court has consistently held that under the Fourteenth Amendment no right to public assistance exists nor is "wealth" per se a suspect classification. *Maher* v. *Roe,* 432 U.S. 464 (1977); *Lavine* v. *Milne,* 424 U.S. 577, 584 n.9 (1976); *Dandridge* v. *Williams,* 397 U.S. 471 (1970); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969).

* As already demonstrated, when the cause of action and jurisdictional portions of § 1 of the 1871 Act were separated, a similar catch phrase, "any law providing for equal rights" was introduced for precisely the same purpose. Rev. Stat. § 629(16), now 28 USC § 1343 (3).

The Court recognized, in addition, that use of the phrase "any law providing for . . . equal civil rights" did not evince an intention to forever freeze the applicability of such removal jurisdiction to the exclusive terms of the 1866 Act. On the contrary, the Court noted that the phrase is "open-ended" and clearly envisioned "removal in cases involving 'a right under' both existing and future statutes that provided for equal civil rights." *Id.* at 789.

Respondent submits that the "equal rights" phraseology of § 1343(3) merits a similar construction. Thus, a § 1983 cause of action may be heard in federal court under § 1343(3) to provide redress whenever rights secured by the Fourteenth Amendment, the successor statutes of the 1866 Act, or legislation that has since been enacted to secure equal rights, are violated by state action. Additional support for this proposition is found in *Baines* v. *City of Danville,* 357 F. 2d 756, 763 (4th Cir.) aff'd 384 U.S. 890 (1966), in which the court of appeals analyzed the same removal statute considered in *Rachel* by comparing it to § 1983. The court found that the "and laws" phrase of the latter was used in the same sense as the term "laws" in the former, which is "consistent with the general congressional purpose in 1875 not to work substantive change." 357 F. 2d at 763. Extrapolating from the decision in *Baines,* one commentator has noted that:

> "[I]t is logical to assume from the language of section 1 of the Civil Rights Act of 1871, that the rights protected include those enumerated in the Acts of 1866 and 1870 and *any* other civil rights act as well as those 'secured' by the Constitution." Laufer, *Hague* v. *C.I.O.: Mr. Justice Stone's Test of Federal Jurisdiction——A Reappraisal,* 19 Buffalo L. Rev. 547, 560 (1970).

Since the Social Security Act does not fit into the category of laws to which § 1983 and § 1343(3) apply, petitioner's claims must necessarily fail. Indeed, petitioner concedes that there is "ample authority" for the proposition that the Social Security Act is not a law providing for equal rights. Brief for Petitioner at 18.

Over the years, the Court has construed the Fourteenth Amendment to secure against state action many of those fundamental rights guaranteed by the Bill of Rights against federal infringement. E.g. *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940) (freedom of speech and religion); *Edwards* v. *South Carolina,* 372 U.S. 229 (1963) (freedom of assembly, freedom to petition for redress of grievances); *Mapp* v. *Ohio,* 367 U.S. 643 (1961) (freedom against unreasonable searches and seizures); *Gideon* v. *Wainwright,* 372 U.S. 335 (1960) (right to a fair trial). Since it is the *Fourteenth Amendment* which secures such rights against state infringement, § 1983 and § 1343(3) are of course available to enforce such rights. See *e.g. Douglas* v. *Jeanette,* 319 U.S. 157 (1943) (free speech and press); *Cruz* v. *Beto,* 405 U.S. 319 (1972) (free exercise of religion); *Tenney* v. *Brandhove,* 341 U.S. 367 (1951) (right to petition legislature). This is true not because § 1983 and § 1343(3) have been expanded in scope, but because the scope of the Fourteenth Amendment has been broadened by judicial construction. The rights provided by the Social Security Act, however, are neither required by the Fourteenth Amendment nor designed to implement it.*

---

* One further reason why petitioner's claims may not be asserted through § 1983 is alluded to in *District of Columbia* v. *Carter, supra.* In that case, the Court held that § 1983 was enacted for the limited

(Footnote continued on following page)

It has always been clear that § 1983 applies only to civil or equal rights, and not to all rights secured by general or common law. *Holt* v. *Indiana Manufacturing Co., supra; Bowman* v. *Chicago & N. R. Co.*, 115 U.S. 611 (1885). The primary deviation from this understanding is the decision in *Bomar* v. *Keyes*, 162 F.2d 136 (2d Cir.), *cert.* denied 332 U.S. 825 (1947). The plaintiff in that case was fired from her job because she had been absent while on federal jury duty. Seeking reinstatement and damages, she filed an action under § 1983. The court felt that whether a cognizable claim had been stated hinged upon whether the federal statute under which she served as a juror conferred upon her a "privilege" secured by the "Constitution and laws." The court found no deprivation of constitutional rights, but nonetheless declared that:

(Footnote continued from preceding page)

purpose of enforcing the Fourteenth Amendment, and since that amendment applies only to the States and not to the nation's capitol, a § 1983 cause of action does not lie to redress rights deprived under color of District of Columbia law. 409 U.S. at 423-425. Implicit in this decision is the fact that the reach of § 1983 is only as broad as the Fourteenth Amendment. The Social Security Act, however, covers a wider area since it applies to all States as well as the District of Columbia. 42 USC § 1302(a)(1). Therefore, if petitioner's construction of § 1983 were to prevail, an anomalous situation would be created in which residents of States could seek the redress of Social Security Act rights under § 1983 and § 1343(3), while District of Columbia residents asserting the same rights would be relegated to an action under 28 USC § 1331(a), including the amount in controversy prerequisite of $10,000. See 409 U.S. at 432, citing *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Surely there is no evidence that Congress intended to make public assistance available to all State and District of Columbia residents under the Social Security Act, but to provide unequal access to federal courts to enforce such rights depending upon the claimant's place of residence.

> "Although the books are full of cases under [§ 1983] concerning the deprivation of rights and privileges, secured by the Constitution, we have been unable to find any in which the right or privilege at stake was secured by a 'law' of the United States. Nevertheless the language is so plain that the only question is whether this particular 'law' secured to the plaintiff a 'privilege'." 162 F.2d at 139.

On the strength of this conclusionary analysis, the court found that an actionable claim had been stated. Most significant is the fact that the court treated § 1983 as both a cause of action *and* jurisdictional grant, and made no reference at all to § 1343(3) and its "equal rights" limitation. Accordingly, it is doubtful that this case adds anything to an analysis of the issues at bar. Perhaps for this reason, other lower courts have declined to follow the lead of *Bomar*. See, *e.g. Walker* v. *Bank of America*, 268 F.2d 16 (9th Cir.), *cert.* denied 361 U.S. 903 (1950); *Insular Police Commission* v. *Lopez*, 160 F.2d 673 (1st Cir.), *cert.* denied 331 U.S. 855 (1947); *Schatte* v. *Int. Alliance of Theatrical Stage Employees*, 182 F. 2d 158 (9th Cir. 1950); *McGuire* v. *Amrein*, 101 F. Supp. 414 (D. Md. 1951).

Purely apart from the light shed by the legislative history, it is clear from the face of § 1343(3) that the result urged by respondent is required. The statute applies only to statutory rights secured by Acts "providing for equal rights." This language is plain and speaks for itself. Petitioner has offered no justification for reading this phrase contrary to its clear meaning, and therefore it should be given full effect.

Whether § 1983 and § 1343(3) are thus read literally or in the context of the events which nurtured their de-

velopment, it is reasonable to view these statutes as complementing one another. Section 1983 provides a framework within which rights deprived by state action may be redressed. Section 1343(3) provides a federal forum for such claims. There is no indication that Congress has ever deviated from its original purpose in enacting these statutes: to enforce the provisions of the Fourteenth Amendment and subsequent legislation which implements that amendment. Since the Social Security Act neither implements the amendment, nor is a necessary adjunct to the enforcement of Fourteenth Amendment guarantees, the Third Circuit properly concluded that petitioner's claim under that Act was not cognizable in the federal courts pursuant to § 1983 and § 1343(3).*

Finally, it is important to note that the conclusion that § 1983 and § 1343(3) are not applicable does not leave petitioner without any remedy. Where rights other than civil rights are conferred by federal statute, the act itself invariably contains unique procedures whereby a party who claims that he has been denied his due under the law may challenge that denial. This is especially true in the Aid to Families with Dependent Children (AFDC) portion of the Social Security Act, which expressly mandates that a "fair hearing" be provided to any individual whose claim is denied or not acted upon with reasonable

* It should be noted that, perhaps in recognition of the existing state of the law, H.R. 9622, 95th Cong., 2d Sess. (1977) was introduced to abolish the $10,000 threshold for federal question jurisdiction. One of the primary purposes of this proposed amendment is to permit welfare claims such as those presented by petitioner to be heard in the district courts. See H.R. Rep. No. 95-893, 95th Cong., 2d Sess. 8, 19 (1978). The House of Representatives approved the bill on February 28, 1978. 124 Cong. Rec. H 1553-H 1570 (daily ed. February 28, 1978).

promptness. 42 USC § 602 (a) (4); see N.J.S.A. 44:10-2, 44:7-18. This is the remedial proceeding provided by Congress. In New Jersey, as in most states, AFDC applicants have an additional measure of protection: the right to judicial review of adverse "fair hearing" determinations. N.J. Ct. R. 2:2-3(a)(2); *Essex County Welfare Board* v. *Department of Institutions and Agencies,* 75 N.J. 232, 237 (1978). In addition, the U.S. Department of Health, Education and Welfare ensures that State AFDC plans conform to federal law by wielding powerful fiscal authority over participating states. 42 USC § 604. This then, is the scheme Congress structured to distribute public assistance funds to the eligible needy. An overly expansive interpretation of § 1983 and § 1343 (3) beyond what Congress intended should not be permitted to circumvent the review procedures specifically provided in the Social Security Act which, after all, is the legislation upon which petitioner relies.

POINT III

Since the public assistance benefits sought by petitioner are not secured by any "act of Congress providing for the protection of civil rights," the district court lacked jurisdiction to consider petitioner's claim.

Notwithstanding any other contentions, petitioner asserts that 28 USC § 1343(4) provides an independent, alternate jurisdictional basis for her claim of denial of emergency public assistance benefits. Section § 1343(4), enacted by Congress to assure jurisdiction over actions arising out of the Civil Rights Act of 1957, grants original jurisdiction to the district courts provided that two prerequisites are satisfied: (1) plaintiff's cause of action

must be "authorized by law," and (2) the relief sought must be grounded in "any Act of Congress providing for the protection of civil rights, including the right to vote." Petitioner's failure to meet either, let alone both, of these requirements provided ample justification for the Third Circuit's conclusion that the complaint should be dismissed.

The legislative history of the 1871 Act plainly demonstrates that § 1983 is the "law" which "authorized" the cause of action to enforce rights within the contemplation of § 1343's "authorized by law" clause. See Comment, *The Civil Rights Act and Mr. Monroe,* 49 Calif. L. Rev. 145, 148 (1961). The precursor of § 1983 was universally viewed not as a source of substantive rights, but as creating a federal remedy to enforce the rights earlier secured by the Fourteenth Amendment and § 1 of the 1866 Act. *Mitchum* v. *Foster, supra,* 407 U.S. at 239 ("Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation."); *Monroe* v. *Pape, supra,* 365 U.S. at 173-174; Cong. Globe, 42d Cong., 1st Sess., app. 50, 68, 216 (1871). As succinctly put by the court below:

> "[S]ection 1983 does not in and of itself create or secure any substantive rights; it merely authorizes a cause of action when rights secured by *another* source have been infringed." 560 F.2d at 168.

Thus, § 1983 is *not* an act "providing for the protection of civil rights" within the meaning of the second criterion specified above because it secures no substantive rights. More importantly, it is by its very terms incapable of satisfying both prerequisites at the same time. For

were § 1983 alone able to satisfy both prerequisites, no substantive civil right would be implicated.

The actual source of petitioner's purported right is § 406(e) of the Social Security Act. Petitioner has pointed to no provision in that Act which "authorizes" a civil action to be brought in compliance with the first prerequisite of § 1343(4). Moreover, petitioner concedes in the face of formidable circuit court authority that the Social Security Act neither provides for equal rights nor protects civil rights. Brief for Petitioner at 18.* As such, petitioner has failed either to state a § 1983 claim or to satisfy the jurisdictional requirements of § 1343(4) respecting her asserted Social Security Act right. Petitioner's argument, appropriately characterized by the Third Circuit as a "chicken-and-egg" approach, should be rejected for this reason.

Proper resort to § 1343(4) is demonstrated by *Allen* v. *Bd. of Elections,* 393 U.S. 544 (1969), a case clearly involving "the right to vote" brought pursuant to the Voting Rights Act of 1965. The Court construed § 5 of the 1965 Act as both authorizing the appellants to file an action for declaratory relief, and securing to them the substantive right to vote notwithstanding certain state enactments which had not been approved by the courts under the terms of the Voting Rights Act. *Id.* at 554-557.

On the other hand, in *Jones* v. *Alfred H. Mayer Co., supra,* plaintiffs sued to enforce their right to purchase property, pursuant to 42 USC § 1982, and invoked juris-

---

* Indeed, even if that Act were construed to protect civil rights, it would certainly not "plug directly into 1343(3) and (4)" as asserted by petitioner (Brief for Petitioner at 18 n.5) since the Social Security Act, as already noted, does not satisfy the "authorized by law" clause of its own accord. Section 1983, though, would suffice.

diction pursuant to § 1343(4). 392 U.S. at 412 n.1. It is first of all clear that the question of jurisdiction was not contested and that therefore no part of the holding of that case concerned the propriety of jurisdiction under § 1343(4). It is firmly established that:

> "when questions of jurisdiction have been passed on in prior decisions sub silentio, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us." *Hagans* v. *Lavine, supra,* 415 U.S. at 532 n.5.

Apart from this principle, however, it is evident that § 1982, which secures the substantive rights first enumerated in the Civil Rights Act of 1866, is "an Act of Congress providing for the protection of civil rights." Since *Jones* was an action to redress private discrimination, and not the deprivation of rights under color of State law, § 1343(4) was the only appropriate source of jurisdiction. Compare § 1343(3), which only applies to deprivations resulting from State action. *Jones* therefore offers no support to petitioner, whose claim is that she has been denied benefits by the State. Accordingly, her claim must stand or fall under § 1983 which, as already demonstrated, does not enforce Social Security Act rights.

Accordingly, the Third Circuit correctly concluded that the Social Security Act does not protect civil rights, and that § 1983 is merely a remedial statute providing a cause of action when such rights, secured elsewhere, are violated. Petitioner's complaint was thus properly dismissed for lack of jurisdiction under § 1343(4).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the United States Court of Appeals for the Third Circuit should be affirmed.

JOHN J. DEGNAN,
Attorney General of New Jersey,
Attorney for Respondent G. Thomas Riti, Director, New Jersey Division of Public Welfare.

STEPHEN SKILLMAN,
Assistant Attorney General,
Of Counsel.

RICHARD M. HLUCHAN,
Deputy Attorney General,
On the Brief.

FOR ARGUMENT

Supreme Court, U. S.
FILED
SEP 13 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-5324

JULIA GONZALEZ ETC.,

Petitioner,

v.

JAMES F. YOUNG, DIRECTOR HUDSON COUNTY WELFARE BOARD, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF OF PETITIONERS

THEODORE A. GARDNER
WILLIAM E. McALVANAH
HUDSON COUNTY LEGAL SERVICES CORP.
Timothy K. Madden, Director
628 Newark Avenue
Jersey City, N.J. 07306
(201) 792-6363

Attorneys for Petitioner

Washington D.C. • CLB PUBLISHERS' • LAW PRINTING CO • (202) 393-0625

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

POINT I THE CONSTRUCT OF RESPONDENTS BRIEF IS PREMISED ON TWO ERRONEOUS POSITIONS 1) THAT 1983 DOES NOT EMBRACE WHOLLY STATUTORY CLAIMS; 2) THAT 1343 CONTAINS A FUNDAMENTAL DISUNITY 1

POINT II PETITIONERS SUPREMACY CLAUSE CLAIM SATISFIES THE TESTS SET FORTH BY THE COURT AS ONE "SECURED BY THE CONSTITUTION" FOR PURPOSES OF ESTABLISHING JURISDICTION UNDER 28 U.S.C. 1343(3) 6

CONCLUSION 12

APPENDIX 1a

TABLE OF AUTHORITIES

Page

Statutes

28 U.S.C. 1343(3) 6,8,12

28 U.S.C. 1331 8,9,11

42 U.S.C. 1983 ..... *passim*

28 U.S.C. 1343 ..... *passim*

Enforcement Act of 1870, 16 Stat. 140 2,3

Civil Rights Act of 1866, 14 Stat. 27 2,3

United States Constitution

Article III, Section 2 8

Cases

American Well Works v. Layne and Bowler Co., 9 Wheat. (22 U.S.) 738, 6 L.Ed. 204 (1824) 7

Bass v. Rockefeller, 331 F. Supp. 945 (S.D.N.Y., 1971) 4

Bell v. Hood, 327 U.S. 678 (1946) 11

Bomar v. Keyes, 162 F.2d 136 (2 Cir.) *cert. den.* 332 U.S. 825 (1947) 4

Carleson v. Remillard, 406 U.S. 598 (1972) 10

City of Greenwood, Mississippi v. Peacock, 384 U.S. 808 (1966) 4

Edelman v. Jordan, 415 U.S. 651 (1974) 4

Gardner v. Collins, 27 U.S. 58 (1824) 3

Gomez v. Florida State Employment Services, 417 F.2d 569 (5 Cir., 1969) 4

Goosby v. Ossner, 409 U.S. 512 (1973) 11

Gully v. First National Bank, 299 U.S. 109 (1936) 8

Hague v. C.I.O., 307 U.S. 496 (1938) 8,10

Hines v. Davidowitz, 312 U.S. 52 (1941) 9

Johnston v. Byrd, 354 F.2d 982 (5th Cir. 1965) 8

Logan v. United States, 144 U.S. 263 9

Lynch v. Household Finance Corporation, 405 U.S. 538 (1972) 2,3,4

Mescalero v. Martinez, 519 F.2d 479 (10th Cir. 1975) 8

Minnesota v. Northern Securities, 119 U.S. 48 (1904) 10

Monell v. Department of Social Services of the City of New York, 46 L.W. 4569 (1978) 5

Osborn v. Bank of the United States, 9 Wheat. (22 U.S.) 738, 6 L.Ed. 204 (1824) 6,7,8

Perez v. Campbell, 402 U.S. 637 (1971) 9

Quern v. Mandley, ____ U.S. ____ , 98 S.Ct. 2068 (1978) 10

Regents of the University of California v. Bakke, 46 L.W. 4896 (1978) 6

Rosado v. Wyman, 397 U.S. 397 (1970) 4,5

Russo v. Kirby, 453 F.2d 548 (2d Cir. 1971) 8

Shulthis v. McDougal, 225 U.S. 561 (1912) 7

Swift and Co. v. Wickham, 282 U.S. 111 (1965) 10

Townsend v. Swank, 404 U.S. 282 (1971) 10

United States v. Guest, 383 U.S. 745 (1966) 9,10

U.S. v. Gooding, 25 U.S. 460 (1827) 3

U.S. v. Menasche, 348 U.S. 528 (1955) 3

Washington Market Co. v. Hoffman, 101 U.S. 112 (1879) 3

Other Authorities

Wright, Miller and Cooper, Federal Practice and Procedure: Jurisdiction Sec. 2562 8

53 Col. Law Review 157 (1953) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-5324

JULIA GONZALEZ ETC.,

Petitioner,

v.

JAMES F. YOUNG, DIRECTOR HUDSON COUNTY WELFARE BOARD, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF OF PETITIONERS

POINT I

THE CONSTRUCT OF RESPONDENTS BRIEF IS PREMISED ON TWO ERRONEOUS POSITIONS: 1) THAT 1983 DOES NOT EMBRACE WHOLLY STATUTORY CLAIMS; 2) THAT 1343 CONTAINS A FUNDAMENTAL DISUNITY.

FIRST ERRONEOUS POSITION

The respondent attempts to vitiate the thrust of Points I thru III of petitioners brief by asserting that the phrase "and laws" in Section 1983 contains a particularized, narrow and technical connotation *viz* it embraces only two laws, namely the Civil Rights Act of 1866 and the Enforcement Act of 1870 (Brief for Respondent at 32). This perception is unsound. Indeed it is in disharmony with compelling judicial exposition.

> Although the original substantive provision [of 1983's precursor] had protected rights, privileges or immunity secured by the Constitution the provision in the Revised Statutes was *enlarged* to provide protection for rights, privileges or immunity secured by federal law as well (Emphasis added). *Lynch v. Household Finance Corporation,* 405 U.S. 538, 92 S.Ct. 1113, 1117 *n.* 7 (1972).
>
> As noted Congress in 1875 also *enlarged* the scope of 1983's predecessor to protect rights secured by federal law as well as rights secured by the Constitution. *See n.* 7 supra. *Lynch v. Household Finance corporation,* 405 U.S. 538, 92 S.Ct. 1113, 1120 *n.* 5 (1972).

These observations certainly impact the respondent's interpretation of the phrase "and laws". Moreover, the respondent's perspective is mired in redundancy. Thus he characterizes the rights embodied in the 1866 and 1870 Acts as being absolutely coequal with rights embodied in the Constitution, specifically in the Fourteenth Amendment (Brief for Respondent at 32). But if this is so the phrase "and laws" becomes completely redundant; indeed a feckless superfluity. But such an interpretation runs directly contrary to one of the guiding, indeed seminal, principles of statutory construction *viz.* no word, sentence or clause shall be

interpreted as superfluous, void or insignificant *Washington Market Co. v. Hoffman,* 101 U.S. 112 (1879), *U.S. v. Gooding,* 25 U.S. 460 (1827), *U.S. v. Menasche,* 348 U.S. 528 (1955). Obviously, if we accept respondent's contention the phrase "and laws" becomes all of these things, that is, it is rendered utterly superfluous, absolutely void and totally insignificant. Certainly this is unacceptable.

Respondent's perspective is inimical to the guiding principles of statutory construction in yet another way. It is axiomatic that the legislative intent can be derived only from the words the legislature uses and the court cannot speculate beyond the reasonable import of those words. *Gardner v. Collins,* 27 U.S. 58 (1829). Put differently, the spirit of an act must be exacted from the words of the act and not from conjectures aliunde *Gardner v. Collins,* id. To be sure, respondent's perception of the phrase "and laws" is openly hostile to this principle. Clearly if Congress intended the phrase "and laws" to have only the restricted and technical import divined by the respondent Congress would have used the phrase "Constitution and Civil Rights Act of 1866 and Enforcement Act of 1870" rather than the phrase "Constitution and laws".

Moreover the construction urged by the respondent is entirely incongruent with the historical period which germinated the phrase "and laws"! That period was marked by "an expansion of national authority over matters that before the Civil War had been left to the states." *Lynch, supra* at 92 S.Ct. 118. Clearly that expansion is impinged, indeed negated, if respondent's view is embraced. Shorn of its polemics respondent's argument entreats the court to engage in a process of revisionistic historicizing. This is unacceptable; in fact it is directly contrary to this court's previous

holdings. *See Lynch* supra at 92 S.Ct. 1113, 1120 n. 5 ("As noted Congress in 1875 also *enlarged* the scope of 1983's predecessor to protect rights secured by federal law as well as rights secured by the Constitution"); *City of Greenwood, Mississippi v. Peacock*, 384 U.S. 808, 86 S.Ct. 1800, 1813 (1966) ("Under 42 U.S.C. 1983 the officers may be made to respond in damages not only for violations of rights conferred by federal equal civil rights laws but for violations of other federal constitutional and statutory rights as well"); *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 1361 and 1362 ("It is of course true that *Rosado v. Wyman*, 397 U.S. 397, 90 S.Ct. 1207, L.E.2d 442 (1970) held that suits in federal court under 1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating States"). *Accord. Bowman v. Keyes*, 162 F.2d 136 (2 Cir.) *cert. den.* 332 U.S. 825 (1947), *Gomez v. Florida State Employment Services*, 417 F.2d 569 (5 Cir. - 1969), *Bass v. Rockefeller*, 331 F.Supp. 945 (S.D. N.Y. 1971), *Blue v. Craig*, 505 F.2d 830 (4th Cir., 1974).

SECOND ERRONEOUS POSITION

The respondent attempts to eviscerate the import of Point III of petitioners brief by contending that 1343 contains a fundamental disunity, to wit: one statute cannot satisfy both the "authorized by law" and the "Act of Congress" clauses of 1343 (Brief of Respondent 42, 43). This contention is erroneous. There is no antithetical necessity contained in these two clauses. Indeed their confluence is noteable since an Act of Congress is a law and a law (federal) is an Act of Congress. Impressment of logical analysis thus defeats rather than supports respondent's contention. Furthermore,

there is no succor in the language of 1343 for respondent's contention. Indeed if Congress intended the preclusion urged by the respondent, it cannot be gainsayed that it would have affixed a proviso clearly spelling out such a limitation. In addition even if such a preclusion were impressed it would not impact the Social Security Act's apposition to the "authorized by law" clause. Obviously the Social Security Act is a law. Equally obvious is the fact that nonadhering [to the AFDC provisions of the Social Security Act] states are subject to civil compliance suits. *Rosado v. Wyman, supra.*

Before completing this reply brief one further comment is imperative. Respondent makes much of the fact that a decision contrary to petitioner will effect minimum harm since petitioner can proceed with her substantive challenge thru fair hearings to state court. (Brief for Respondent at 40-41). In point of fact respondent has argued successfully in state court that an action grounded on a conflict between New Jersey welfare regulations and the Social Security Act *must* be brought in federal court *not* in state court. *See* the opinion of the Superior Court of New Jersey Appellate Division in *Atchison, etc. v. Klein, et als.* reproduced as Appendix 1a thru 4a to this brief. Obviously what respondent desires *sub judice* is to place petitioner in a jurisdictional imbroglio where jurisdiction rests neither in federal nor in state court. This approach should not, indeed cannot, be countenanced.

In short the respondents' views do not impact the conclusions set forth in the petitioner's brief.[1]

[1]The unmistakeable trend is to broadly interpret 1983 and 1343. *See* most recently *Monell v. Department of Social Services of the City of New York*, 46 L.W. 4569 (June 6, 1978) where the court held that local governmental officials and local independent school boards are persons within the meaning of 42 *U.S.C.* 1983. Respondent's position *sub judice*

(continued)

POINT II

PETITIONERS SUPREMACY CLAUSE CLAIM SATISFIES THE TESTS SET FORTH BY THE COURT AS ONE "SECURED BY THE CONSTITUTION" FOR PURPOSES OF ESTABLISHING JURISDICTION UNDER 28 U.S.C. 1343(3).

Respondents argue, in Point I of their brief, that petitioner's Supremacy Clause Claim is insufficient to confer jurisdiction under 28 *U.S.C.* 1343(3) as a claim "secured by the Constitution" in that resolution of the claim does not require any inquiry into the Constitution, operation, or effect of the Supremacy Clause. Respondents base this conclusion on the "time honored test" established by Justice Marshall in *Osborn v. Bank of the United States,* 9 Wheat. (22 *U.S.*) 738, 6 L.Ed. 204 (1824). In that case the United States Bank brought suit to enjoin the state auditor of Ohio from collecting a tax alleged to violate the U.S. Constitution. The Supreme Court found jurisdiction, based on an exclusive grant in the bond's charter which enabled it to sue, or be sued, in the Courts of the United States, consistent with the United States Constitution.

Justice Marshall, in language which has been cited in later cases as a test for determining the existence of a federal question for jurisdictional purposes, stated the following:

(footnote continued from preceding page)
is obviously inimical to the principle of broadly interpreting 1983 and 1343. *See* also *Regents of the University of California v. Bakke,* 46 L.W. 4896, 4902 (June 28, 1978) for the proposition that a narrow interpretation is disfavored in the face of a Congressional intent to establish a broad principle of federal law. In our case it is apparent that Congress enacted a broad legislative scheme of federal oversight. That being so respondent's position should be disfavored.

> "If it be a sufficient foundation for jurisdiction, that the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action, be made out, then all the other questions must be decided as incidental to this, which gives the jurisdiction." 9 Wheat. (22 *U.S.*) at 822

However, Justice Marshall's later analysis in the opinion reflects an even broader test for jurisdiction, holding that whenever some element of federal law is an "ingredient" of the claim jurisdiction exists:

> "We think, than that when a question to which the judicial power of the union is extended by the Constitution, forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it." 9 Wheat. (22 *U.S.*) at 823.

In addition to the fact that appellant's may have cited the holding of *Osborn* decision more restrictively than necessary for purposes of jurisdiction, a number of later cases dealing with this issue of what constitutes, "arising under the Constitution" for jurisdictional purposes have differed as to the meaning of this language.

There is language by Justice Holmes' to the effect that "a suit arises under the law that creates the action" *American Well Works v. Layne and Bowler Co.*, 241 *U.S.* 257, 260 (1916). Also Justice VanDevanter, in *Shulthis v. McDougal,* 225 *U.S.* 561, 569 (1912) held that for jurisdictional purposes, "a suit does not so arise unless it really and substantially involves a dispute or controversy re-

specting the validity, construction, or effect of such a law, upon the determination of which the result depends." This test, which is similar to *Osborn*, has been criticized by commentators on several grounds. One, that is contrary to the rule that jurisdiction has to be found in plaintiff's complaint. Also its application is faulty regarding those claims where defendant defaults, or there are only questions of fact, and the meaning of the constitution or federal law is not in issue. *Wright, Miller, and Cooper, Federal Practice and Procedures: Jurisdiction Sec.* 3562, footnotes 26, 27. In *Gulley v. First National Bank*, 299 *U.S.* 109 (1936) Justice Cardoza sets forth another test for jurisdiction as "arising under the Constitution" at page 118: "Controversies that are basic and those that are collateral; between disputes that are necessary and those that are merely possible." Finally several circuit courts have adopted the more recent test, proposed by Professor Mishkin, set forth in 53 *Col. L. Rev.* 157, 168 (1953) that for federal question jurisdiction there has to be "a substantial claim founded directly upon federal law." See *Johnston v. Byrd*, 354 F.2d 982, 984 (5th Cir. 1965), *Russo v. Kirby* 453 F.2d 548, 551 (2d Cir. 1971), *Mescalero v. Martinez*, 519 F.2d 479, 481 (10th Cir. 1975). The aforementioned cases all involve the issue of whether a claim arises under the Constitution or federal law for purposes of jurisdiction in Federal Court under Article III, Sec. 2 of the Constitution or 28 *U.S.C.* 1331. However the language of 28 *U.S.C.* 1343(3) is somewhat different i.e. "secured by the Constitution," and the cases interpreting this provision use language even broader and more encompassing than that contained in 28 *U.S.C.* 1331. Justice Stone, in *Hague v. C.I.O.* 307 *U.S.* 496, 526 (1938) defined the "secured by the Constitution" phrase as "rights protected by the Constitution and hence secured by it." Justice Brennan, in a separate opinion, in *U.S. v. Guest*, 383 *U.S.* 745, 779 (1966) found that:

> The term "secured" means "created by, arising under, or dependent upon," *Logan v. United States*, 144 *U.S.* 263, 293, rather than "fully protected." A right is "secured. . . by the Constitution" within the meaning of (18 *U.S.C.*) Sec. 241 if it emanates from the Constitution, if it finds its source in the Constitution.

While this Court has not had the occasion to consider whether the Supremacy Clause is a jurisdictionally conferring claim, under either 28 *U.S.C.* 1331, or 28 *U.S.C.* 1343, petitioners believe that this clause, in the instant case, meets the tests as historically set forth in the prior cases. At the center of a Supremacy Clause claim is the issue of whether federal law is consistent, or in conflict, with state law and if in conflict, is it to the extent that it violates the Constitution. This analysis has been stated by Justice White, in *Perez v. Campbell*, 402 *U.S.* 637, 644 (1971), "deciding whether a state statute is in conflict with a federal statute and hence invalid under the Supremacy Clause is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the Constitutional question of whether they are in conflict." It is clear from the opinion that this later step is not automatic, but involves an analysis of whether the challenged state statute "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress" *Hines v. Davidowitz*, 312 *U.S.* 52, 67 (1941). This accepted definition of the application of the Supremacy Clause, is used either to uphold, or invalidate, the state statute or regulation in question. Therefore, contrary to respondents analysis, this second step is not automatic and undisputed, but involves a

determination of the degree of frustration of the federal statute, which is constitutionally unacceptable. However, even if the application of the Supremacy Clause claim, in a given factual context involves little or no construction, and the conflict is evident when they are compared, the tests established in *Hague, supra,* and *Guest, supra,* are sufficiently inclusive for Constitutional purposes, to grant jurisdiction in the case at bar. As Justice Harlen stated, in *Swift and Co. v. Wickham,* 282 *U.S.* 111 (1965), "Any such pre-exemption or conflict claim is of course *grounded* in the Supremacy Clause of the Constitution."

This analysis of the Supremacy Clause would support a finding that it comes within the "secured by the Constitution" definition in *Guest, supra,* in that it "emanates from the Constitution, if it finds its source in the Constitution."

This showing, that a Supremacy Clause claim secures Constitutional rights, distinguishes it from the full faith and credit clause analogy of the respondents. The later clause having been held to be only indirectly, or peripherally involved in cases, and only applied by judges automatically after it becomes an issue in a pending case. See *Minnesota v. Northern Securities,* 119 *U.S.* 48 (1904). Also distinguishing the Supremacy Clause, from a full faith and credit clause, is the fact that the Supremacy Clause can be, and has been raised successfully by individuals as the sole claim involved. See *Townsend v. Swank,* 404 *U.S.* 282 (1971), *Carleson v. Remillard,* 406 *U.S.* 598 (1972).

Appellants further argue that a decision in *Quern v. Mandley,* ____ *U.S.* ____, 98 *S. Ct.* 2068 (1978) (decided after appellants brief was filed) holding that section 406(e) of the Social Security Act, 42 *U.S.C.* Sec. 606(e) is not binding on the states, would undercut petitioners Supremacy Clause

Claim. While this may be true as to the ultimate merits of the claim, it would not be the case for purposes of determining, from the complaint, the propriety of the jurisdictional dismissal directed by the third circuit. See *Goosby v. Ossner,* 409 *U.S.* 512 (1973) and *Bell v. Hood,* 327 *U.S.* 678 (1946).[2]

Finally, it is important to note the pragmatic consideration involved in this case. Appellants allege, that if this Court finds that the Supremacy Clause concerns rights "secured by the Constitution" within the meaning of 28 *U.S.C.* 1343, the federal courts will be inundated with all kinds of claims, from avocados to turkeys, under the guise of Civil Rights jurisdiction. While it is not difficult to particularize a claim which factually would seem inappropriate under 28 *U.S.C.* 1983, the vast majority of Supremacy Clause Claims effect significant federal - state interests. There is also no evidence to indicate that Supremacy Clause Claims would create a burden on the Federal judiciary. Furthermore, federal courts are the most appropriate forum to hear the case at bar, which involves a claim under the United States Constitution, federal monies under the Social Security Act, and an issue of fundamental importance to an individual in the lower economic strata of our society, who should be able to avail herself of a federal forum, no less so than those who can meet the judicial amount requirement under 28 *U.S.C.* 1331.

---

[2]It must be stressed that petitioners' complaint has been dismissed *for jurisdictional reasons.*

CONCLUSION

For the reasons aforestated and for the reasons set forth at length in the brief of the petitioner this court should hold:

1). 42 U.S.C. 1983 is an Act of Congress providing for equal rights of citizens as required by 28 U.S.C. 1343(3).

2). 42 U.S.C. 1988 is an Act of Congress providing for the protection of civil rights as required by 28 U.S.C. 1343(4).

3). Since 1343(3), 1343(4), and 1983 are coextensive jurisdiction is established in the instant case even accepting arguendo the premise that the Social Security Act is not an Act of Congress providing for equal rights or for the protection of civil rights.

4). The Supremacy Clause satisfies the "secured by the Constitution" requirement of 28 U.S.C. 1343(3) thus providing an alternative basis for jurisdiction.

The judgment of the 3rd Circuit directing that the complaint be dismissed for want of jurisdiction should be reversed.

Respectfully submitted,

HUDSON COUNTY LEGAL
SERVICES CORP.
Timothy K. Madden, Director
Attorneys for Plaintiff

By: /s/ THEODORE A. GARDNER
Theodore A. Gardner

/s/ W. E. McALVANAH
William E. McAlvanah

APPENDIX

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1864-73

JULIA ATCHISON, KATIE BALDON
and ELIZABETH HOLMES,

Petitioners-Appellants,

v.

ANN KLEIN, Commissioner of the
State Department of Institutions
and Agencies; G. THOMAS RITI,
Acting Director of the Division of
Public Welfare; MICHAEL GALUPPO,
Acting Director of the Union County
Welfare Board,

Respondents-Respondents.

Submitted May 20, 1975 — Decided June 19, 1975.

Before Judges Carton, Crane and Kole.

On appeal from Division of Welfare, Department of Institutions and Agencies.

Mr. James J. Lynch (Union County Legal Services), attorney for appellants.

Mr. William F. Hyland, Attorney General of New Jersey, attorney for respondents (Mr. Richard M. Conley, Deputy Attorney General, of counsel; Mr. Paul Norman Watter, Deputy Attorney General, on the brief).

PER CURIAM

Appellants Atchison, Baldon and Holmes appeal a determination of the Division of Welfare, Department of Institutions and Agencies, sustaining the action of the Union County Welfare Board in terminating the public assistance benefits received through the Aid to Families with Dependent Children program (ADC), or, in the case of appellant Atchison, reduction of her benefits to the nominal sum of $3.00 per month. We reserved decision, pending consideration of the matter on the merits, on respondents' motion to dismiss the action for lack of jurisdiction.

In computing ADC grants, the recipient is required to submit a financial budget showing all sources of income. Persons in private employment are permitted to disregard $30 per month and one-third of the excess of their income in computing their total income. The regulation of the Division of Welfare prohibits the use of such "income disregards" by public service employment program employees. Thus, the central issue for decision is whether a county welfare board and the Division of Welfare, Department of Institutions and Agencies, may properly consider income earned from employment under the Work Incentive - Public Service Employment program in determining eligibility for ADC benefits.

New Jersey's Aid for Dependent Children program operates in the framework of a federal program and receives substantial federal funding. The Federal Aid to Needy Families with Children program is established as part of the Social Security Act under 42 *U.S.C.A.* 601 *et seq.* State eligibility for federal funds is contingent on the State's adoption of an assistance plan which satisfies the requirements of 42 *U.S.C.A.* 602. Failure to administer a State plan in accordance with Section 602 requirements can result in the withdrawal of federal assistance. The New Jersey Legislature has recognized the program's dependence on federal assistance, and by *N.J.S.A.* 44:10-3 has directed that the New Jersey program comply with federal requirements.

The State action complained of on this appeal is based on a State regulation which was adopted in accordance with the requirements of the United States Department of Health, Education and Welfare (HEW).

Appellants' basic contentions are that the New Jersey regulation under the authority of which the Union County Welfare Board acted in terminating or reducing their benefits, conflicts with the Social Security Act, 42 *U.S.C.A.* 602(a)(19)(1) *et seq.*, and that it is unconstitutional in that it discriminates between public service employment employees and other employees.

It is thus apparent that the attack on the State agency's regulation is in effect a challenge to the correctness of HEW's construction of a federal statute and the constitutionality of a regulation mandated by that construction. It is evident to us that HEW is an indispensable party to the granting of the relief sought by appellants. Since HEW is not a party and this court cannot compel it to be made a party, we conclude that this court should not attempt to exercise jurisdiction. Nor are we persuaded by appellants' secondary contention, that termination of ADC benefits was based in sufficient measure on policy decisions and actions solely within the State's discretion. It cannot fairly be argued that a judgment in their favor would not prejudice any interest of the United States Government or HEW. Nor is it correct that appellants can obtain relief only in the State courts at this juncture.

We note that the issues raised by appellants in this case are the subject of litigation in conflicting decisions in the federal

courts in Massachusetts, *Dunbar v. Weinberger,* Civil Action No. 74-882-F (D. Mass., decided August 7, 1974), and Vermont, *Betts v. Weinberger,* Civil Action No. 73-182 (D. Vermont, decided March 24, 1975), and it seems likely that the issue will ultimately be decided by the United States Supreme Court. Under the circumstances, we do not see how any hardship can be visited on the appellants by requiring that they bring an action, if they deem it desirable, in the federal court where HEW can be made a party. Any issues raised by appellants incidental to the primary issue of the alleged conflict with the Social Security Act and the claimed unconstitutionality of the act and regulations can readily be decided by that court on the basis of federal precedent. If they prevail in the federal court, they may then proceed in the appropriate State forum for any further relief to which they may be entitled.

The motion for dismissal of the appeal on which we heretofore reserved judgment is granted.

A TRUE COPY

A TRUE COPY.

Elizabeth W. Langlois

Clerk

see

7 7

7 1 9